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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 90

CARLOTA BENTEEZ SAMPAYO, PETITIONER,

vs.

THE BANK OF NOVA SCOTIA

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT**

PETITION FOR HABEAS CORPUS FILED MAY 21, 1940.

HABEAS CORPUS GRANTED OCTOBER 14, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 90

CARLOTA BENITEZ SAMPAYO, PETITIONER,

vs.

THE BANK OF NOVA SCOTIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 1] [Captions omitted]

[File endorsement omitted]

[fol. 2]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF PUERTO RICO**

DEBTOR'S PETITION—Filed October 13, 1938

**For Composition or Extension under Section 75 of the
National Bankruptcy Act**

Bankruptcy No. 1435

To the Honorable Judge of the District Court of the United
States for the District of Puerto Rico:

The Petition of Carlota Benitez Sampayo of Ponce,
Puerto Rico, in the county of Ponce, Puerto Rico and Dis-
trict and Territory of Puerto Rico,

Respectfully Represents: That she is primarily bona fide
personally engaged in producing products of the soil, the
production of poultry and livestock and the production of
poultry products in their unmanufactured state and that
the principal part of her income is derived from one or
more of the foregoing operations, as follows: production
of sugarcane and the processing of same into sugar and
molasses, production of cattle, poultry and sale of eggs;
that such operations occur in the counties of Ponce and
Vieques (District of Humacao), within said judicial dis-
trict; that she is unable to meet her debts as they mature
and that she desires to effect a composition or extension
of time to pay her debts under section 75 of the Bankruptcy
Act.

That the schedule hereto annexed, marked A (1, 2, 3, 4,
5), and verified by your petitioner's oath, contains a full
and true statement of all her debts, and (so far as it is
possible to ascertain) the names and places of residence of
[fol. 3] her creditors and such further statements concern-
ing said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked B (1, 2, 3, 4,
5, 6) and verified by your petitioner's oath, contains an
accurate inventory of all her property, both real and per-

sonal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore Your Petitioner Prays that her petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

(Sgd.) Carlota Benitez Sampayo, Debtor; Address:
No. 10 Mendez Vigo St., Ponce, Puerto Rico.

Duly sworn to by Carlota Benitez Sampayo. Jurat omitted in printing.

[fols. 4-65] Petition approved and case referred to Enrique Igaravidez, Esq., Conciliation Commissioner.

San Juan, Puerto Rico, October 13, 1938.

(Sgd.) Martin Travieso, Acting Judge.

[fols. 66-120] IN UNITED STATES DISTRICT COURT

ORDER APPROVING PETITION AS PROPERLY FILED UNDER SECTION 75, AND REFERRING CASE TO CONCILIATION COMMISSIONER—Filed October 13, 1938

At San Juan, Puerto Rico, on the 13th of October, 1938, before the Honorable Martin Travieso, Acting Judge of said Court, the petition of Carlota Benitez Sampayo praying that she be afforded an opportunity to effect a composition or an extension of time to pay her debts under Section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

It is further ordered, that upon the petition filed in this Court by said Debtor on October 13th, 1938, said matter be referred to E. Igaravidez, one of the Conciliation Commissioners of this Court, to take such further proceedings therein as are required by said Act; and that the said Carlota Benitez Sampayo, shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said proceedings for a composition or extension.

Witness, the Honorable Martín Travieso, Acting Judge of said Court, and the seal thereof, at San Juan, P. R. this 13th day of October, 1938.

Lulu G. Donohue, Clerk, by (Sgd.) Matilde Shepard,
Deputy. (Seal.)

[fol. 121] IN UNITED STATES DISTRICT COURT

AMENDMENT OF PETITION UNDER SECTION 75 (S)—Filed
November 30, 1938

To the Honorable the Judge of this Court:

The Petition of Carlota Benitez Sampayo respectfully shows:

I. That on the thirteenth day of October, 1938, petitioner filed her petition for a composition or extension under Section 75 of the Bankruptcy Act, which said petition was thereafter duly approved and the proceeding referred to Honorable Enrique Igaravidez, one of the Conciliation Commissioners of this Court.

II. That petitioner has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by said composition or extension proposal.

Wherefore, petitioner hereby amends her said petition pursuant to the provision of Section 75 (s) of the Bankruptcy Act and asks to be adjudged a bankrupt, and for such other and further relief to which she may be entitled.

San Juan, Puerto Rico, November 30, 1938.

(Sgd.) Carlota Benitez Sampayo, Debtor. Geigel & Silva, by J. E. Geigel, Attorneys for Debtor, The Chase National Bank Bldg., P. O. Box 1359, San Juan, P. R.

Duly sworn to by Carlota Benitez Sampayo. Jurat omitted in printing.

[fol. 122] IN UNITED STATES DISTRICT COURT

PETITION FOR APPRAISAL, ETC.—Filed November 30, 1938

Comes now Carlota Benitez Sampayo, Debtor in the above entitled proceedings, through her undersigned attorneys and respectfully shows and prays:

1. That on this date and in the course of the first meeting of creditors called pursuant to her petition filed herein, your petitioner submitted an extension proposal or plan

covering all her debts and having failed to obtain the acceptance of a majority in number and amount of her creditors, whose claims are affected by said extension proposal, your petitioner proceeded to amend and did amend her original petition filed herein, by asking to be adjudged a bankrupt in accordance with and pursuant to the provisions of Section 75 (s) of the Bankruptcy Act and as required by the jurisprudence interpreting same.

2. That your petitioner desires that all of her property wherever located, whether pledged, encumbered, or unencumbered exemptions, or unencumbered interest or equity in her exemptions as prescribed by the laws of the United States and of Puerto Rico and, in particular, the share in the conditional or benefit payments already accrued or accruing to your petitioner from the 1937-1938 and subsequent crop years as under the Sugar Act of 1937 as may be determined by the U. S. Secretary of Agriculture, be set aside to her, and that she be allowed to retain possession or be placed in possession of all of the remainder of her property, including her unencumbered exemptions, under the terms and conditions provided in said section.

Wherefore, Carlota Benitez Sampayo prays the Hon. Court to enter an order providing as follows:

(a) That all of her property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, at its present fair and reasonable market value under the jurisdiction of this Hon. Court, by appraisers designated and appointed as provided in said Act.

(b) That her unencumbered exemptions, or unencumbered interest or equity in her exemptions, as prescribed by the laws of the United States of America and of Puerto Rico and the rules for the case made and provided and, in particular, the share in the conditional or benefit payments already accrued or accruing to your petitioner from the [fols. 124-130] 1937-38 and subsequent crop years, under the Sugar Act of 1937 and may be determined by the U. S. Secretary of Agriculture, be set aside to her.

(c) That she be allowed to retain possession or be placed in possession of all of the remainder of her property, wherever located, including her unencumbered exemptions and, in particular, the conditional or benefit payments already

accrued or accruing to your petitioner from the 1937-1938 and subsequent crop years, under the Sugar Act of 1937, as may be determined by the U. S. Secretary of Agriculture pursuant to the provisions of said Sugar Act and under the terms and conditions provided in said Section 75 (s).

San Juan, P. R., November 30, 1938.

(Sgd.) Carlota Benitez Sampayo, Debtor. Geigel & Silva, by (Sgd.) J. E. Geigel, Attorneys for Debtor.

Duly sworn to by Carlota Benitez Sampayo. Jurat omitted in printing.

[fol. 131] IN UNITED STATES DISTRICT COURT

PROOF OF DEBT—Filed November 23, 1938

In the city of San Juan, Puerto Rico, on this 23rd day of November, 1938 came Jorge Luis Cordova, of legal age, married, Lawyer, and resident of this city, and made an oath and said:

1. That he is one of the attorneys for The National City Bank of New York, a banking association duly organized and existing under the laws of the United States, with principal office at 55 Wall Street, New York, New York; that this Proof of Debt is presented by him and not by one of the officers of the said Bank because the claim is one pertaining to the New York Office of the said Bank and none of the officers of the Puerto Rican Branches of the Bank has any relation therewith nor any knowledge of the facts relative to said claim, and that none of the officers of the New York Branch who are familiar with the facts are present in Puerto Rico.

2. That he is duly authorized to make this proof and says [fol. 132] that Carlota Benitez, the debtor who has filed a petition under Section 75 of the Bankruptcy Act, is justly and truly indebted to the said National City Bank of New York in the sum of \$2208.13, with interest thereon at 8% per annum for May 27, 1931, until full payment, and in the sum of \$14,520.22, with interest thereon at 8% per annum from June 30, 1931, until full payment and in the further

sum of \$350.00 plus interest thereon at 5% per annum from April 18, 1938, until full payment.

3. That the consideration for the said debt is a judgment recovered by the National City Bank of New York against the said Carlota Benitez, the debtor herein, in the District Court of San Juan, on April 18, 1938, certified copy of which is attached hereto and made to form a part of this Proof of Debt.

4. That no part of said judgment has been paid and that, according to deponent's information and belief, the only security held by The National City Bank of New York for said debt is an attachment levied by the National City Bank of New York, in the action wherein the said judgment was obtained, covering the interest of Carlota Benitez and others in the properties known as "Central Playa Grande", Vieques, P. R., and in a property known as "Comunidad", located at Vieques, P. R., wards Llave, Mosquitos, Florida, Mulas, Puerto Diablo, Puerto Real, and Campana, having an area of 6542.275 cuerdas, which attachment is subjected to the previously recorded mortgages held, according to deponent's information, by The Bank of Nova Scotia.

San Juan, Puerto Rico, this 23rd. day of November, 1938.
[fol. 133] (Sgd.) Jorge L. Córdova, Deponent; Fidler, Cordova & MacConnell, by (Sgd.) H. S. McConnell, Attorneys for The National City Bank of New York. Affidavit No. 10280.

Sworn to and subscribed before me by Jorge Luis Cordova, of legal age, married, resident of San Juan, P. R., lawyer and personally known to me at San Juan, P. R., this 23rd day of November, 1938.
(Sgd.) L. E. Dubon, Notary Public. (Seal.)

25¢ stamp cancelled by notary seal.

IN UNITED STATES DISTRICT COURT

PROOF OF UNSECURED DEBT—Filed November 30, 1938

At San Juan, in said district of Puerto Rico, on the 30th day of November, A. D. 1938, came the law firm Geigel & Silva, represented by Guillermo Silva, Esq., of San Juan,

in the county of San Juan, in said district of Puerto Rico, and make oath and says that Carlota Benitez Sampayo, the person by whom a petition in proceedings for composition, or extension under Section 75 of the Bankruptcy Act has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of \$500.00; that the consideration of said debt is as follows: [fol. 134-173] Professional services rendered as per her request in legal proceedings before the District Court of the United States for Puerto Rico.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that deponent has not, nor has any person by this order, or to his knowledge or belief, for his use, had or received any manner of security of said debt whatsoever. That this claim is free from usury.

(Sgd.) Guillermo Silva.

Subscribed and sworn to before me this 30th day of November, A. D. 1938, by Guillermo Silva, of legal age, attorney at law, and a resident of San Juan, to me personally known.

(Sgd.) Enrique Igaravidez, Conciliation Commissioner.

[fol. 174] IN UNITED STATES DISTRICT COURT

MOTION FOR DISMISSAL—Filed December 1st, 1938

Now comes the Bank of Nova Scotia, represented by its undersigned counsel, and to the Court states:

I

That Carlota Benitez Sampayo, petitioning Debtor herein, filed her voluntary petition under Section 75 of the Bankruptcy Act, on October 13th, 1938, and this Court on the same day approved said petition as being properly filed and referred it to the United States Conciliation Commissioner.

II

That the Bank of Nova Scotia had no notice of said petition until after its approval as aforesaid.

III

That the Bank of Nova Scotia is a creditor of said petitioning debtor.

IV

That the petitioning debtor is not primarily bona fide personally engaged in producing products of the soil, or engaged in dairy farming, the production of poultry or live-[fol. 175] stock, or the production of poultry products or livestock, products in their unmanufactured state, nor is the principal part of any income received by her derived from any one or more of the foregoing operations.

That said petitioning debtor is not a "farmer" as defined in Section 75 of the Bankruptcy Act.

V

That this Court does not have jurisdiction to entertain the proceedings debtor.

VI

That the petition filed herein is not filed in good faith, but is filed to defraud the Court and interfere with proceedings now pending before the Court.

VII

That the plan offered by the petitioning debtor is unfair, unequitable, contrary to law, impracticable, and was not presented in good faith.

VIII

That the petitioning debtor has never been in possession of the properties described in her petition.

Wherefore, it is prayed that the petition herein and all proceedings had thereunder be dismissed with costs to the petitioning debtor.

[fol. 176] San Juan, Puerto Rico, December 1st, 1938.

Brown, Gonzalez & Newsom, by Walter L. Newsom,
Counsel for The Bank of Nova Scotia.

Notified with copy, this 1st day of December, 1938. Enrique Igaravidez, U. S. Conciliation Commissioner; Geigel & Silva, per Juan Enrique Geigel, Attorneys for Carlota Benitez Sampayo.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE THE PETITION OF THE BANK OF NOVA
SCOTIA—Filed December 12, 1938

Now comes Carlota Benitez Sampayo, through her undersigned attorneys and to the Court states and prays:

1. That on or about November 28th, 1938, the Bank of Nova Scotia filed a pleading herein entitled "Petition of the Bank of Nova Scotia".

[fol. 177] 2. That your petitioner believes that said pleading should be stricken from the record on the grounds of vagueness, incompleteness, uncertainty, indefiniteness, and/or ambiguity.

3. That in case the entire petition is not stricken from the record, then allegations number X, XI, XII and XIII of said petition should be stricken from the record because they are irrelevant, immaterial and impertinent to the remedy that to the belief of the Bank of Nova Scotia, apparently pretends to obtain through the filing of said Petition.

Wherefore, Carlota Benitez Sampayo respectfully prays the Hon. Court to enter another providing as follows:

A. That the petition to which this motion to strike refers, be stricken from the record.

B. That in case said petition be not stricken from the record, that allegations number X, XI, XII, and XIII be stricken.

San Juan, Puerto Rico, December 9, 1938.

Geigel & Silva, by (Sgd.) Guillermo Silva, Attorneys
for Carlota Benitez Sampayo.

Notified with copy this — day of December, 1938. Brown, Gonzalez & Newsom, by Walter L. Newsom, Jr., Attorneys
for the Bank of Nova Scotia.

[fol. 178] IN UNITED STATES DISTRICT COURT

ANSWER AND OPPOSITION OF CARLOTA BENITEZ SAMPAYO TO
THE MOTION FOR DISMISSAL FILED HEREIN—Filed De-
cember 12, 1938

Comes now Carlota Benitez Sampayo, (to be hereinafter referred to as Respondent) through her undersigned attor-

neys, and in answer and opposition to the motion for dismissal filed by The Bank of Nova Scotia in the above captioned matter, respectfully alleges and shows:

1. For a first and independent defense, that the motion filed herein and to which this answer and opposition refers does not state any matter of law or equity entitling The Bank of Nova Scotia to the relief prayed for in said motion.

2. For a second and independent defense, that said The Bank of Nova Scotia has no status as creditor or party in interest in these proceedings, entitling it to apply for or obtain the relief prayed for, said The Bank of Nova Scotia appearing as a debtor and not as creditor in the schedules filed by Respondent herein, and not having appeared in these proceedings within the time and in the form and manner provided by the Bankruptcy Act, nor filed a proof of claim against Respondent.

3. That said The Bank of Nova Scotia, even though it did have the necessary status as a party in interest to these proceedings (which Respondent denies) could not raise is-[fol. 179] sues of fact which must be tried dehors the record, through motion to dismiss, said procedure being altogether inadequate and improper.

4. For a fourth and independent defense that said The Bank of Nova Scotia having made no defenses to Respondent's original petition on the merits and having furnished no excusable explanation for failure to interpose said defenses in the regular course and within the time fixed by the Bankruptcy Act, said The Bank of Nova Scotia, even though it were a party in interest in these proceedings, (which Respondent denies) would be guilty of laches which bar the granting of the relief prayed for in its motion to which this answer and opposition refers.

5. For a fifth and independent defense, that there having been a general reference of Respondent's original petition to the Hon. Conciliation Commissioner for the District since October 13, 1938 the issue of lack of good faith, if at all, should have been raised before the Hon. Conciliation Commissioner within the time fixed by the Bankruptcy Act and not belatedly before this Hon. Court after Respondent is proceeding under Section 75 (s).

6. For a sixth and independent defense, that the motion filed herein by said The Bank of Nova Scotia is equivalent to an opposition to the adjudication of Respondent on her voluntary petition filed under Section 75 (s) of the Bank- [fol. 180] ruptcy Act, such opposition not being contemplated or permitted under the provisions of the law and the rules for the case made and provided.

7. For a seventh and independent defense, that said The Bank of Nova Scotia, even if it did have the necessary status as party in interest in these proceedings, (which Respondent denies) is estopped from alleging that Respondent is not a farmer because of its having previously alleged and proved in Equity suit No. 2151 before this Court, in which said Bank is plaintiff and Respondent is one of the defendants, all the facts tending to establish that Respondent is and has always been a farmer as defined in Section 75 (r) of the Bankruptcy Act.

8. For an eighth and independent defense, that Respondent having filed before the Hon. Judge of this Court her amended petition praying to be adjudicated a bankrupt and having also filed her petition for appraisal on November 30, 1938, in accordance with the provisions of Section 75 (s) and the question of feasibility of her plan or extension proposal not having been seasonably raised before the Hon. Conciliation Commissioner for the District to whom the case was referred, while Respondent was proceeding under Section 75 (a) to (r), the issue being now raised "In Bankruptcy", said issue, if at all, may only be raised by a party in interest to these proceedings after the appraisal provided by said Section 75 (s) shall have been completed and [fol. 181] the Hon. Conciliation Commissioner shall have made a report to the Hon. Judge of this Court on said appraisal and as to the feasibility of said extension proposal or plan.

9. For a ninth and independent defense, that the allegation made by The Bank of Nova Scotia to the effect that Respondent is not a farmer is not sufficient to join issue on that jurisdictional question, in view of the fact that Respondent filed her original petition verified under oath and that same was promptly approved by the Hon. Judge of this Court, while the motion to which this answer and opposition refers has not been verified under oath.

10. For a tenth and independent, defense, that the motion filed herein by said The Bank of Nova Scotia and to which this answer and opposition refers may not be passed upon by this Hon. Court, it being that same contravenes the provisions of Section 18 (c) of the Bankruptcy Act requiring that all pleadings setting up matters of fact shall be verified under oath.

11. For an eleventh and independent defense, that the motion to which this answer and opposition refers has been set for hearing on motion day of this Court in contravention of the provisions of the law and the rules for the case made and provided and, in particular, of Rule 4 of this Court, now in full force and effect, which provides that motion day shall be dedicated to the hearing of only such petitions and other pleadings as can be disposed of exclusively upon [fol. 182] argument of counsel, while the motion to which this answer and opposition refers raises important questions of fact which may be only tried and decided, (if at all) in the course of a plenary hearing calling for the submission of voluminous documentary evidence and other proof.

12. For a twelfth and independent defense, that said The Bank of Nova Scotia has improperly joined in its motion to which this answer and opposition refers certain issues which (if at all) should be tried before the Referee, with issues that (if at all) may only be tried before the Hon. Judge of this Court, in violation of the law and the rules for the case made and provided.

13. For a thirteenth and independent defense, that the Findings of Fact and Conclusions of Law made by this Hon. Court pursuant to the final decree made and entered on August 22, 1938 in said Equity suit No. 2151, in which said The Bank of Nova Scotia is plaintiff and Respondent is one of the defendants, definitely and conclusively establish the status of Respondent as a farmer, as defined in Section 75 (r) and as of the time of the filing of Respondent's original petition herein, said finding of fact and conclusions of law and the final decree entered in said suit being res adjudicata as to said issue and binding as such on said The Bank of Nova Scotia.

And now answering to the merits and without waiver of any of the defenses hereinbefore interposed, Respondent respectfully represents to the Hon. Court:

[fol. 183]

I

Respondent admits allegation No. I of the motion to which this answer and opposition refers.

II

Respondent denies the allegation to the effect that said The Bank of Nova Scotia had no notice of the filing of her petition herein and of its approval by the Court. On the contrary, Respondent alleges that Walter L. Newsom, Jr., Esq., the attorney for said The Bank of Nova Scotia, was in the office of the Clerk of this Court shortly after Respondent had personally filed her petition herein with said Clerk. And Respondent further alleges that a few hours thereafter and while the said Walter L. Newsom, Jr., Esq., and Edward B. Lesesne, Esq., the Special Master appointed by this Court to handle the sale in execution of the pledges and other securities belonging to Respondent and other co-proprietors pursuant to the decree made and entered in said Equity suit No. 2151 before this Court, in which said The Bank of Nova Scotia is Complainant and Respondent is one of the defendants, J. Octavio Seix, Respondent's husband and attorney-in-fact, stated to said attorney for said The Bank of Nova Scotia and to the said Special Master Lesesne, in the presence of witnesses, that said sale in execution could not be legally held because Respondent had filed her petition under Section 75 of the Bankruptcy Act, said petition having been approved by the Hon. Judge of this Court and after considerable discussion over the subject, said Walter L. Newsom, Jr., informed Respondent's husband that he was not going and after considerable discussion over the subject, said Walter L. Newsom, Jr., informed Respondent's husband that he was not going to discuss the matter further with him. Whereupon said Special Master continued with the sale and thereafter a bid was submitted by said Walter L. Newsom, Jr., Esq., on behalf of said Bank, which bid was subsequently accepted by said Special Master and approved by this Hon. Court.

And Respondent further alleges that the record of this case shows that on or about October 31, 1938 the Hon. Enrique Igaravidez, Conciliation Commissioner for the District, notified said The Bank of Nova Scotia that the first meeting of creditors pertaining to the above captioned matter would be held at his office in the city of San Juan,

P. R. on the 12th day of November 1938, furnishing said Bank at the same time all the other information and data provided by Section 75 (e) of the Bankruptcy Act.

And Respondent further alleges that on or about that time, said The Bank of Nova Scotia received written notice from Respondent's husband, the said J. Octavio Seix, to the effect that her said petition had been filed and approved by the Hon. Judge of this Court.

III

Respondent denies that said The Bank of Nova Scotia has qualified as a creditor or party in interest in the above captioned matter and on the contrary alleges on information and belief that said The Bank of Nova Scotia has not even [fol. 185] filed a proof of claim herein, nor did it even appear and subject itself to the jurisdiction of this Hon. Court in these proceedings, through its Conciliation Commissioner, while Respondent was proceeding under Section 75 (a) to (r) of the Bankruptcy Act but, on the contrary, said The Bank of Nova Scotia continues up to this date maintaining that this Hon. Court is without jurisdiction to entertain the proceedings herein, although without any foundation in fact.

IV

Respondent denies the allegation to the effect that she is not primarily, bona fide, personally engaged in producing products of the soil or in the production of poultry or livestock products in their unmanufactured state. And Respondent further denies the allegation to the effect that the principal part of her income is not derived from one or more of the foregoing operations. On the contrary, Respondent alleges that she is and has been a farmer, as defined in Section 75 (r) of the Bankruptcy Act since the year 1917 and continuously up to this date.

Respondent admits that she is not engaged in dairy farming but alleges that she has never claimed to have been or to be thus engaged, or that it should be necessary for her to be engaged exclusively in that occupation or in conjunction with the other farming operations and agricultural pursuits in which she is engaged, in order for her to be able to qualify as a farmer under Section 75 (r).

[fol. 186] Respondent further alleges that having filed her original petition verified under oath under Section 75 (a)

to (r), in which petition all the jurisdictional facts appear and said petition having been promptly approved by the Hon. Judge of this Court, said The Bank of Nova Scotia may not overcome or even challenge her qualification as a farmer through allegations couched in the precise language of the statute, particularly when the motion in which said allegations have been incorporated has not been verified under oath.

Respondent further denies the general allegation to the effect that she is not a farmer and on the contrary alleges that said The Bank of Nova Scotia has repeatedly admitted in allegations and statements made before this Hon. Court under oath the necessary facts tending to show that Respondent qualified as a farmer, as defined in Section 75 (r) of the Bankruptcy Act. And Respondent further alleges that from the findings of fact, conclusions of law and opinion made by this Hon. Court pursuant to its decree entered on August 22, 1938 in said Equity suit No. 2151 filed before this Court and in which said The Bank of Nova Scotia is plaintiff and Respondent is one of the defendants, it appears that Respondent definitely qualifies as a farmer pursuant to the provisions of said Section 75 (r) and was such farmer at the time of the filing of her petition herein.

V

Respondent denies the allegation to the effect that this Hon. Court does not have jurisdiction to entertain the proceedings instituted herein by Respondent.

VI

Respondent denies that the petition filed herein has not been filed in good faith. And Respondent further denies that her said petition has been filed to defraud the Court and to interfere with proceedings now pending before this Court. On the contrary, Respondent alleges that it is the said Bank of Nova Scotia that is not proceeding in good faith. And Respondent further alleges that it is the motion for dismissal filed by said The Bank of Nova Scotia and to which this answer and opposition refers that constitutes a fraud on the Court and on the law, said motion for dismissal having been filed with ulterior motives and with a view of depriving Respondent from availing herself

of the remedies afforded to her as a farmer by said Section 75 of the Bankruptcy Act.

VII

Respondent denies that the extension proposal or plan offered by her in these proceedings is unfair, inequitable, contrary to law and impracticable. And Respondent further denies that said extension proposal or plan was not presented in good faith. On the contrary, Respondent alleges that her said extension proposal or plan filed herein as provided by law is undoubtedly one of the most reasonable and fair that has ever been prepared or offered by a farmer-debtor proceeding under Section 75. And Re-[fol. 188] spondent further alleges that her said extension proposal or plan includes a fair equitable and feasible method of liquidation for all her creditors (both secured and unsecured) and of financial rehabilitation for Respondent, said plan being for the best interests of all of Respondent's creditors.

And Respondent further alleges that her said extension proposed or plan was and is the essence of honesty of purpose, freedom from intention to defraud, absence of design to take an unconscionable advantage of another and evidences such candor and frankness in recognizing obligations as reflects sincerity and willingness to perform them, so much so that her said extension proposal or plan presents with good faith.

VIII

Respondent denies that she has never been in possession of the properties described in the schedules attached to her petition filed herein and on the contrary alleges that she has been in uninterrupted actual or constructive possession of all of the entire share of the properties belonging to her since the year 1917 and up to this date.

And Respondent further alleges that there are certain valuable assets listed in her schedules filed herein of which she has had actual possession for quite some time past, which assets belong to her exclusively and which besides are a thing altogether apart from the assets involved in said Equity suit No. 2151 pending before this Court and hereinbefore referred to in further detail.

[fol. 189] Wherefore, Carlota Benitez Sampayo respectfully prays the Hon. Court to enter an order dismissing the

motion for dismissal to which this answer and opposition refers, with costs.

San Juan, P. R., December 9th, 1938.

(Sgd.) Carlota Benitez Sampayo. Geigel & Silva,
by Guillermo Silva, Attorneys for Bankrupt.

Duly sworn to by Carlota Benitez Sampayo. Jurat omitted in printing.

[fols. 190-224] Notified with copy of the foregoing on this 9th day of December, A. D. 1938.

Brown, Gonzalez & Newsom, by Walter L. Newsom,
Jr., Attorneys for the Bank of Nova Scotia.

[fol. 225] IN UNITED STATES DISTRICT COURT

OPINION—Filed January 3, 1939

This matter arises upon a motion of a creditor to dismiss the petition filed herein under Section 75 of the Bankruptcy Act. The schedules of the debtor describe as her property some 100 hens and a large number of pigeons with certain poultry raising equipment. She claims to be a farmer under the Act, engaged in the poultry business. But with respect to that business she is not insolvent. She claims it produces a profit of about \$50.00 per month and that she owes no debts and has incurred none with respect to such operations. These operations are carried on at her home in [fol. 226] Ponce. If this were all the facts in this case the petition would be dismissed without more.

But the said debtor claims to be a farmer as defined under the Act by virtue of her alleged operations of growing sugar cane, and processing it and cane grown by other into raw cane sugar and molasses.

José J. Benitez e Hijos, a contractual community of which the debtor is a member, owns several thousand acres of land located in Vieques, certain livestock, implements, and buildings. The land is devoted to production of sugar cane and to pasturage. The community also owned the capital stock of Benitez Sugar Company, which corporation owned a sugar mill railroad and rolling stock, land, livestock and other

properties. The properties of both since prior to 1917 have been operated as a single enterprise devoted to the production of raw cane sugar and molasses.

The debtor has never personally engaged in the operations of said properties and enterprise nor has she ever participated in the management thereof. She has furnished no money for such operations, has paid no taxes on the properties and enterprise, nor does she receive the principal part of her income from said properties.

Clearly, with respect to the operations of the sugar enterprise in Vieques, the debtor is not a farmer as defined in the Act.

[fol. 227] Even if she were a farmer with respect to the sugar enterprise, the properties of the Community Jose J. Benitez e Hijos and Benitez Sugar Company could not be administered by a Court of Bankruptcy upon the voluntary petition of the petitioning debtor.

As a member of the Community the debtor is the owner of a one-twelfth undivided interest in fee and a remainder after a life estate in a one-sixtieth undivided interest. Her brother, two sisters, the heirs of a deceased sister, and her father are the other members of the community. Although the community agreement expired in 1935, the affairs of the Community have not yet been wound up. The Community agreement is in essence a partnership agreement.

The Supreme Court of Puerto Rico, in a recent case with reference to this very community, has clearly explained the nature of the interest of a member thereof. That interest is limited to the share which may correspond to him upon liquidation of the community debts and affairs, and while a member's interest may be transferred, mortgaged and is subject to attachment, the grantee, mortgagee, or attaching creditor, is entitled only to what corresponds to the member upon liquidation of the debts and affairs of the community.

The undivided interest of the debtor is all that can be brought into the bankruptcy court upon her voluntary petition. Certainly it will not be contended that the bankruptcy [fol. 228] court may, upon such a voluntary petition, liquidate and wind up the affairs of the community.

The debtor, in her proposal for composition and her request for adjudication under sub-section (s), in effect asks the Bankruptcy Court to entertain partition proceedings, partition the properties of the Community and place the

debtor in possession of such specific property as may be partitioned to her. It is clearly not within the jurisdiction of the Bankruptcy Court to entertain such proceedings and Section 75 of the Act was never designed to permit such proceedings.

Furthermore, the properties of the Community are not susceptible of physical partition or, stating the matter another way, the only method of equitable division would be by sale and liquidation and division of the net proceeds.

It is interesting to note that this petitioning debtor opposed a partition suit brought by the custodian of her brother who had filed a petition for composition and extension under Section 74 of the Bankruptcy Act.

The fact that a judge of a federal court sitting in equity could protect the rights of all the parties as well as if he were sitting in bankruptcy could not effect the exclusive jurisdiction of the Bankruptcy Court on filing of a petition by a farm debtor under Section 75 of the Act. (See *Naylon v. Cartley*, 96 Fe. (2d) 761.)

[fol. 229] The Court cannot, however, but make reference to the equity proceedings pending with respect to the said sugar enterprise and its properties.

In consolidated equity cause 2151 a reorganization committee has been formed, a plan of reorganization filed, approved by the Court for submission and submitted to all the members of the Community and all the creditors and claimants, who have also been given the right to intervene or file their claims. A hearing on said plan has been set for January 9, 1939. All the properties are in the hands of the Receiver appointed in said case and are being administered and operated by him.

While the Court finds it unnecessary to here consider in detail the proposal for composition and extension submitted by the debtor prior to her request for adjudication under Section 75 (s) of the Act, it is impressed by the conspicuous absence in that proposal of any plan or method whereby the debtor is to finance the operations of the properties which she claims.

Taking into consideration all the facts and circumstances of this matter, the Court is compelled to conclude that the proceedings herein were initiated for the sole purpose of causing further undue delay in the said equity proceedings, and in order to harass the creditors and other members of

[fol. 230] the Community. The debtor has not proceeded herein with the good faith required by the Act.

Consequently, the petition filed herein and all proceedings had thereunder must be dismissed and an order to said effect will be entered.

San Juan, P. R., January 3rd, 1939.

(Sgd.) Robt. A. Cooper, Judge.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed January 3, 1939

Carlota Benitez Sampayo on October 13th, 1938 filed a petition as a farm-debtor under Section 75 of the Bankruptcy Act for composition and extension of her debts, in which she alleged that she was primarily bona fide personally engaged in producing products of the soil, the production of poultry and livestock and the production of poultry products in their unmanufactured state, and that the principal part of her income is derived from one or more of the foregoing operations as follows: production of sugar cane and the processing of same into sugar and molasses, production of cattle, poultry and sale of eggs. She also alleged that she was unable to pay her debts as they matured. Schedules were included. On the same date the petition was [fol. 231] approved by the Court as being properly filed and referred to the Conciliation Commissioner.

At the first meeting of creditors held November 12th, 1938, the debtor submitted a proposal for composition but failed to obtain acceptance from her alleged creditors.

On November 30th, 1938 she filed a petition for adjudication as a bankrupt under sub-section (s) of said Section 75 and another such petition on December 1st, 1938, and prayed that she be allowed to retain possession of or be placed in possession of her alleged properties as provided in the Act.

On December 1st, the Bank of Nova Scotia, as a creditor, filed a motion to dismiss the petition and all proceedings had thereunder on the grounds that (1) the debtor was not a farmer as defined in Section 75 of the Act; (2) that the petition was not filed in good faith; (3) that the Court is without jurisdiction; (4) that the proposal for composition

submitted is unfair, inequitable, contrary to law, impracticable and not submitted in good faith; and (5) that the debtor has never been in possession of the properties described in her schedules.

On December 12th, 1938 the debtor filed its answer and opposition to said Motion for Dismissal, and on December 27th, 1938 a hearing was had on the issues raised.

[fol. 232] Testimony was presented by The Bank of Nova Scotia and affidavits were filed by the debtor. Counsel stipulated that the records in Equity Cases 2151, 2349 and 2350 and 2322 now pending before this Court, and Bankruptcy Case No. 1258, as well as the record in the present case would be considered as evidence in this matter.

Upon consideration thereof the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

The debtor and her husband, Mr. J. Octabio Seix, reside in the city of Ponce, the latter being engaged in business and is president of The Pan-American Trading Company, a mercantile firm located in said City.

At their home in Ponce debtor has about 110 chickens and several hundred pigeons which produce eggs, friers and squabs which she sells. For approximately the last year and one-half she has had this poultry and has received a profit of about \$50.00 per month therefrom.

These operations are profitable, she owes no debts of any kind incurred with respect to said poultry business, and she carried on these operations personally.

[fol. 233] She receives, and has received from her husband, not less than \$200.00 per month.

II

The debtor is one of the members of a contractual Community of properties with the name Jose J. Benitez e Hijos and as such one of the co-owners of several thousand acres of land located in the Island of Vieques, livestock, farming implements and equipment and formerly all of the capital stock of a corporation The Benitez Sugar Company, which corporation is the owner of a sugar factory, railroad

and rolling stock, livestock and several hundred acres of land.

Her share in said Community amounts to a one-twelfth undivided interest in fee and a remainder after a life estate of a one-sixtieth undivided interest. She acquired her said interest by inheritance from her mother, who died in 1917. Since that date all of the said properties have been operated as one single enterprise and devoted to the production of raw cane sugar and molasses therefrom and from sugar cane grown by independent farmers financed by said corporation and the transportation and marketing of said sugar and molasses. The term of the Community contract expired July 30th, 1935, but the affairs of the Community have not been liquidated.

The Community contract is essentially a partnership agreement.

[fol. 234]

III

The debtor has never intervened in the operation of the said properties nor the sugar enterprise to which devoted, nor has she ever participated in the management thereof.

She has never been in actual possession of said properties or any of them.

From and including the year 1933 she has received no income from said properties or sugar enterprise except for the sum of \$3,000 which was paid to her in 1933 or 1934 for the execution of a deed of extension of the Community and approximately \$20,000 which she received in 1937 as a share of benefit payments paid by the Agricultural Adjustment Administration with respect to the 1935 sugar crop, and pursuant to an agreement of division of said benefit payments entered into with the other members of the Community, The Benitez Sugar Company and The Bank of Nova Scotia.

She has never furnished any money for the properties and sugar enterprise, has never paid any taxes on said properties, nor did she invest any of the monies received in said properties or sugar enterprise.

IV

The other members of said Community are the debtor's brother Jose de Jesus Benitez Sampayo, and her two sisters

Arcadia and Josefa Benitez Sampayo, each having an equal [fol. 235] undivided interest, Gabriel Ferrer Otero and Gabriel Ferrer Benitez, husband and son of a deceased sister of the debtor, who acquired an equal undivided interest by inheritance from said decedent, and the debtor's father Jose J. Benitez Diaz, who is the owner of a one-half undivided interest in fee and a life estate in a one-twelfth undivided interest.

V

The Bank of Nova Scotia has financed the said properties and enterprise since prior to 1927 by annual crop loans and other loans secured by first mortgages and chattel mortgages on said properties and a pledge of the capital stock of Benitez Sugar Company and other securities.

In July 1933, the said Bank entered into possession of said properties and operated them until they were taken over by the Receiver appointed by this Court in Equity case No. 2151 on October 20th, 1936. Said Receiver has operated them since said date and is now in possession of and operating them.

VI

Said Equity suit No. 2151 was initiated by said Bank to foreclose on the pledges of first mortgage notes or bonds, chattel mortgages and stock pledges or assigned to it in guaranty, and to realize on a refractionary or crop lien. [fol. 236] The Court allowed other creditors to intervene or file their claim in said suit and upon petition granted said Bank permission to file foreclosure proceedings on the mortgages it held as pledgee in the nature of ancillary suits. The Bank has filed equity suits 2349 and 2350 for foreclosure of mortgages on the realty and the receivership has been extended to them and the three suits consolidated as consolidated cause No. 2151.

A decree was entered in favor of said Bank on its bill of complaint and supplemental bill in equity case No. 2151, and on October 13th, 1938 the Master sold the pledged securities at public auction, said Bank having bought them in at said sale. The Master's sale was confirmed by order of this Court entered October 24th, 1938, and said mortgages, chattel mortgages, shares of stock and other securities have been conveyed to said Bank.

A reorganization committee was formed and has submitted a proposed plan of reorganization which has been approved by the Court for submission and it has been transmitted to all creditors, claimants and members of said Community. A hearing on said plan is set for January 9th, 1939.

VII

Jose de Jesus Benitez Sampayo, one of the members of said Community, on November 9th, 1937 filed a petition for [fol. 237] composition and extension under Section 74 of the Bankruptcy Act, and the Court on several occasions has refused to stay proceedings in Equity Case No. 2151 upon petition of said debtor and his custodian.

The said Jose de Jesus Benitez Sampayo, by his custodian, on April 12th, 1938 filed Equity suit No. 2322 against the other members of the said Community for partition of its said properties, but upon motion of Carlota Benitez Sampayo, the petitioning debtor herein, to dismiss for alleged lack of jurisdiction filed June 7th, 1938, the said suit has been held in abeyance.

VIII

The Debtor herein has no debts other than those which may possibly arise by virtue of her secondary liability as a member of said contractual community.

CONCLUSIONS OF LAW

I

The Debtor is not a farmer, as defined in Section 75 of the Bankruptcy Act, with respect to the properties and sugar enterprise of the Community Jose J. Benitez e Hijos and the Benitez Sugar Company.

II

If the debtor be a farmer, as defined in the Act, with respect to her poultry business, she is not insolvent or unable to pay her debts with respect thereto as they mature.

[fol. 238]

III

The debtor by her individual petition cannot bring the properties of the said Community nor the Benitez Sugar Company under the Administration of the Bankruptcy Court.

IV

This Court as a bankruptcy court is without jurisdiction to entertain the debtor's petition filed herein.

V

The petition of the debtor was not filed in good faith and the debtor has not proceeded herein in good faith.

VI

The petition filed herein and all proceedings had herein should be dismissed with costs to the petitioning debtor.

San Juan, Puerto Rico, January 3rd, 1939.

(Sgd.) Robt. A. Cooper, Judge.

IN UNITED STATES DISTRICT COURT

DECREE OF DISMISSAL—Filed January 3, 1939

This cause came on at this term for hearing on a motion to dismiss filed by the Bank of Nova Scotia, and the petitioning debtor's answer and opposition thereto, and trial [fols. 239-265] was had thereon December 27th, 1938.

Now upon the testimony and documentary evidence produced at said hearing, and the Findings of Fact and Conclusions of Law made and entered herein on this date and hereby incorporated as a part of this decree, it is hereby

Ordered, Adjudged and Decreed That the petition filed herein and all proceedings had thereunder be and the same hereby are dismissed, with costs to the petitioning debtor.

January 3rd, 1939.

Robt. A. Cooper, Judge.

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[fol. 266] IN UNITED STATES DISTRICT COURT

Cause #1435

In the Matter of CARLOTA BENITEZ SAMPAYO, Debtor
(Farmer), (Ponce)

Cash Received and Disbursed

	Rec.	Dis.
1938		
Oct. 13—C. B. Sampayo.	\$10	
Dec. 31—Treas. of U. S. Dept. 12/31/38		\$10
1939		
Jan. 9—Geigel & Silva	\$5	

Under Section 75 of Bankruptcy Act

Conciliation Commissioner Enrique Igaravidez

DOCKET ENTRIES

1938

October 13. Petition under Section 75 of Bankruptcy Act filed in duplicate at 9:03 A. M. with schedules attached.

October 13. Order approving petition and referring case to E. Igaravidez, Conciliation Commissioner filed and entered. Att. copy to Igaravidez and one petition and schedules.

November 29. Petition of Bank of Nova Scotia for continuance, etc. filed.

November 30. Petition of debtor for adjudication under subsection S Bankruptcy Act filed.

[fol. 267] November 30. Petition of debtor for appraisal filed.

November 30. Order entered referring petition filed Nov. 29 to Conciliation Commissioner for Report and setting hearing for Dec. 9, 1938. Attested copies to Geigel & Silva, Brown and Con. Commissioner.

November 30. Order Re: Report of Conciliation Commissioner and setting hearing for December 9, 1938 filed and entered.

December 1. Motion for dismissal.

December 8. Motion for subpoena filed.

December 9. Hearing continued to December 12, 1938.

December 10. Motion requesting Felipe F. Vidal to furnish Court with information, etc. filed.

December 12. Motion to strike petition of Bank of Nova Scotia filed.

December 12. Answer and opposition of Debtor to petition of Bank of Nova Scotia, filed.

December 12. Answer and opposition of debtor to motion to dismiss filed.

December 12. Motion to strike motion of December 13, 1938 filed.

[fol. 268] December 12. Hearing on motion to dismiss etc. had, etc. and continued to December 20, 1938.

December 12. Hearing on motion for continuance of proceedings in Equity 2151 had, motion to strike denied, etc. matter held in Abeyance.

December 16. Hearing on motion to dismiss continued to December 19, 1938.

December 19. Hearing on motion of December 10 regarding information had motion denied.

December 19. Hearing on motion to dismiss continued to December 27, 1938.

December 22. Exception of debtor to Special Report of Conciliation Commissioner filed.

December 22. Petition for subpoena duces tecum filed—approved. Subpoena duces tecum and one copy issued.

December 27. Subpoena duces tecum returned and filed, executed.

December 27. Petition to quash service of subpoena filed.

December 27. Hearing on motion to dismiss and opposition had motion to quash service of subpoena heard and overruled. Court announced that order dismissing case would be signed on ground that debtor was not a farmer. Order to be prepared.

[fol. 269] December 27. Identifications 1 to 6 filed—refused. (Affidavits of Antonio Farinacci, Julio Usera, Erasto Arjona Siaca, Reinaldo Rivera, Francisco S. Subirá and Jose T. Díaz.) *

December 27. Petition requesting adjudication filed.

1939

January 3. Finding of fact and Conclusion of Law filed and ent-red. Copies to Attorneys.

January 3. Opinion filed and ent-red. Copies to Attorneys.

January 3. Decree of dismissal filed and entered. Copy to attorneys.

January 9. Exception of Debtor to order of dismissal filed.

January 9. Notice of appeal filed at 11:00 A. M.

January 9. Petition and order of appeal and fixing bond at \$300 filed. Order entered.

January 9. Assignment of errors filed.

January 9. Cost bond on appeal filed, (\$300) order entered approving.

January 9. Citation on appeal and one copy issued to Marshal. Citation returned.

[fol. 270] January 19. Praeipe filed.

January 19. Statement of evidence filed.

January 20. Notice of settlement of statement of evidence filed.

January 30. Hearing Re: Settlement of statement of Evidence continued to February 3, 1939.

February 3. Proposed Amendments of Bank of Nova Scotia to Statement of Evidence filed.

February 3. Appellee Praeipe for Record, filed.

February 3. Hearing Re: Settlement of Statement of Evidence continued until February 8, 1939.

February 8. Hearing Re: Settlement of Statement of evidence continued until February 10, 1939.

February 9. Objection of Debtor Carlota Benitez Sampayo to proposed amendments, to Statement of Evidence filed by Bank of Nova Scotia, filed.

February 10. Settlement of Statement of Evidence called. Upon request of Mr. Silva, Atty. Debtor he is allowed 5 days to file amended Statement of Evidence.

[fol. 271] March 7. Motion and order extending time to April 7 to file Statement of Evidence, filed. Order entered.

March 23. Motion to withdraw as counsel of Carlota B. Sampayo filed order.

March 31. Order entered granting motion for withdrawal, order to be prepared. Copy to Seix.

April 10. Amended Statement of Evidence filed in compliance with order of the Court filed.

April 10. Submission of Statement of Evidence filed.

April 10. Attested copy journal entry of March 31, 1939 issued to Seix.

April 13. Order allowing Geigel & Silva to withdraw as

atty. for debtor filed and entered. Attested copy to Carlota Benitez Sampayo.

April 17. Objections to appellant's praecipe filed.

April 17. Petition for enlargement of time filed (of debtor to file record).

April 18. Motion for extension of ten days to file amendment to Statement of Evidence filed, Approved.

April 21. Order enlarging time to file record on Appeal 60 days from April 17, 1939, filed and entered. Exception noted by appellee.

[fol. 272] April 21. Hearing on objections of appellant to counter-praecipe of appellee continued.

April 21. Attested copy of Order this date and Journal entry sent to Carlota Benitez Sampayo.

April 28. Proposed Amendments to amended Statement of Evidence filed.

May 12. Hearing on Amended Statement of Evidence and proposed amendments thereto had and the matter taken under advisement.

May 12. Hearing on the objections of Debtor-appellant to counter-praecipe of Appellee continued until further order.

June 2. Order re: Statement of Evidence filed and entered. Copies to Debtor and Brown.

June 2. Statement of Evidence filed.

June 16. Order re: Statement of Evidence filed and entered. Attested copy to Carlota Benitez Sampayo.

June 22. Statement of Evidence filed June 2, 1939 was amended and re filed June 22.

June 28. Order re: Statement of Evidence filed, attested copy issued to Carlota Benitez Sampayo.

June 30. Exception of Debtor-Appellant to Order of June 28, 1939, filed.

June 30. Attested copy of Order of Circuit Court of Appeals to proceed in Forma Pauperis, filed.

[fol. 273] IN UNITED STATES DISTRICT COURT

MEMORANDUM

Petition for appeal filed January 9, 1939.

Order allowing appeal filed and entered on January 9, 1939.

Cost bond on appeal in the amount of \$300.00 filed January 9, 1939; Carlota Benitez Sampayo, Principal, Maryland Casualty Company, surety.

Citation on appeal issued January 9, 1939; service acknowledged on January 9, 1939.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 9, 1939

Now Comes Carlota Benitez Sampayo, Debtor in the above entitled proceedings and complainant and, in connection with her petition for allowance of appeal herein, says that in the record of the proceedings and in the final decree made and entered in the above entitled matter manifest errors were committed to the prejudice of said Debtor, to wit:

First. The Court erred in failing to strike from the record and in due course, the pleading filed herein by The Bank of Nova Scotia entitled "Petition of The Bank of Nova Scotia" and which resulted in the decree complained of as prayed for in the Motion to strike filed by Debtor herein and submitted to the Court on December 9, 1938.

Second. The Court erred in failing to strike from the record and in due course the pleading filed herein by The Bank of Nova Scotia entitled "Motion for Dismissal" and which resulted in the decree complained of as prayed for in [fol. 274] the Motion to strike filed by Debtor herein and submitted to the Court on December 9, 1938.

Third. The Court erred in refusing to adjudge Debtor herein a bankrupt promptly, pursuant to the provisions of Section 75 (s) of the Bankruptcy Act since her original petition under Section 75 (a) to (r) had been approved as properly filed under said Section and Debtor herein had complied with all the provisions of the law and the rules for the case made and provided.

Fourth. The Court erred in entering its order of November 21, 1938 vacating in its most fundamental aspects the order of the Conciliation Commissioner dated November 12, 1938 directing the Receiver in Equity Suit No. 2151 in which The Bank of Nova Scotia is plaintiff and Debtor

herein one of the defendants to file a report pursuant to the provisions of Section 69 (d) of the Bankruptcy Act because said order, besides being contrary to law, prevented Debtor herein from asserting her rights under said Section and, in particular, from placing in the record of this case conclusive information definitely establishing that Debtor herein is a farmer as defined in Section 75 (r). *v/l*

Fifth. The Court erred in entering its order of November 30, 1938 requiring the Conciliation Commissioner to render a report pursuant to the provisions of Section 75 (o) of the Bankruptcy Act and maintaining said order in full force and effect up to the time of the hearing because said order, besides being contrary to law, led Debtor herein into believing that a summary and not a plenary hearing would be held in connection with the proceedings had herein and [fol. 275] which resulted in the decree complained of.

Sixth. The Court erred in failing to find that the order of Subpoena duces tecum issued to Debtor herein to appear as witness for said The Bank of Nova Scotia in the course of the hearing which resulted in the Decree complained of was null and void, contrary to law and should be quashed, for the following reasons:

(a) Because at the time of the service of the citation, neither the marshal effecting the service, nor anybody else tendered to Debtor herein the fees to cover traveling expenses from her residence in the city of Ponce, to the city of San Juan and one day's attendance at the place of examination, as required by law.

(b) Because said The Bank of Nova Scotia was not a party to these proceedings when said order was entered and the citation issued, said Bank having never filed a proof of claim in these proceedings, nor appeared before the Hon. Conciliation Commissioner while Debtor was proceeding under Section 75 (a) to (r) said The Bank of Nova Scotia appearing as debtor and not as creditor in the schedules filed by Debtor herein, exclusive of a claim for \$50,000.00 previously filed by Debtor in Equity suit No. 2350 against said Bank and which had been omitted from Debtor's schedules through inadvertence.

(c) Because said order of subpoena duces tecum called for the production of all of Debtor's books, records and

[fol. 276] papers referring to and hearing upon Debtor's poultry business and her farming operations extending over a period in excess of five years, without describing the exact records and papers to be produced, said procedure being an abuse of the process of this Court, not contemplated or permitted under the law and employed for the purpose of harassing Debtor herein and preventing her from preparing for the hearing to be held and which resulted in the decree complained of.

(d) Because the hearing to which said order of service referred were null and void, initiated in violation of the law.

(e) Because the proceedings to which said order referred were proceedings initiated by motion or petition, which fall within the category of summary proceedings, this Court not having seasonably entered an order converting said summary proceedings into a plenary action or hearing so that Debtor herein was deprived from an opportunity to marshal or subpoena her witnesses and to obtain and offer such evidence as may be offered in plenary proceedings but which could not be offered in proceedings of the nature of the ones involved.

Seventh. The Court erred in permitting The Bank of Nova Scotia to offer evidence as in a plenary hearing on the basis of granting Debtor herein reasonable time within which to prepare and submit her evidence and then refusing to grant such additional time to Debtor herein.

[fol. 277] Eighth. The Court erred in failing to find that the petition and motion filed by The Bank of Nova Scotia herein, which resulted in the decree complained of, were tantamount to an opposition to the adjudication of Debtor herein on her voluntary amended petition filed under Section 75 (s) of the Bankruptcy Act, such opposition not being contemplated or permitted under the law.

Ninth. The Court erred in failing to find that said The Bank of Nova Scotia is estopped from alleging that Debtor herein is not a farmer because of it having previously alleged and proved in Equity suit No. 2151 before this Court in which said Bank is plaintiff and Debtor herein is one of the defendants, all the facts tending to establish that Debtor herein is a farmer, as defined in Section 75 (r) of the Bankruptcy Act.

Tenth. The Court erred in failing to find that the allegations made by The Bank of Nova Scotia to the effect that Debtor herein is not a farmer are not sufficient to join issue on that jurisdictional question, in view of the fact that Debtor herein filed her original petition in the above entitled proceedings verified under oath and that said petition was promptly approved by the Hon. Martin Travieso, then Acting Judge of this Court, while neither the petition, nor the "Motion for Dismissal" filed by said Bank and which resulted in the Decree of Dismissal complained of were verified under oath.

Eleventh. The Court erred in failing to find that both the petition and the "Motion for Dismissal filed herein by The [fol. 278] Bank of Nova Scotia and which resulted in the Decree of Dismissal complained of, not having been verified under oath, same could not be passed upon and decided, it being that such lack of verification contravenes the express provisions of Section 18 (c) of the Bankruptcy Act.

Twelfth. The Court erred in failing to find that the issues raised by the petition and by the said "Motion for Dismissal" which resulted in the Decree of Dismissal complained of, not appearing from the records of the above entitled proceedings, may not be raised by petition or motion, said procedure being altogether inadequate and improper, as alleged in independent defense No. 13 set up to the said petition and independent defense No. 3 set up to the "Motion for Dismissal".

Thirteenth. The Court erred in failing to find that Debtor herein is a farmer irrespective of her agricultural enterprise in the island of Vieques, Puerto Rico, since she is and has been engaged for quite some time prior to the filing of her petition herein in the production of poultry and of poultry products in their unmanufactured state and on a business or commercial scale in the Ponce District.

Fourteenth. The Court erred in failing to find that even though the nature of Debtor's agricultural enterprise in the island of Vieques, Puerto Rico should not permit her for the time being to apply for and obtain the relief, provided for farmers under Section 75 of the Bankruptcy Act, Debtor's qualifications as a farmer originating from the production of Poultry and poultry products *products* in

[fol. 279] their unmanufactured state on a business of commercial basis in the Ponce District and her inability to pay her debts as they mature nevertheless entitle Debtor herein to apply for and receive such relief and to have all of her property and property rights subjected exclusively to and administered under the provisions of said Section.

Fifteenth. The Court erred in failing to find that since Debtor herein filed her petition in the above entitled proceedings on October 13, 1938 at 9:05 o'clock A. M. and the public sale held in execution of the pledge or securities pursuant to the decree made and entered in said Equity suit No. 2151 before this Court was effected after said event had occurred, said sale, as well as the order of this Court dated October 24, 1938 confirmed same and the order of this Court dated November 3, 1938 approving the deed of conveyance executed pursuant to said order of confirmation are nugatory and of no legal consequence, in view of the automatic and self-executing stay provided by subsections (o) and (p) of Section 75 of The Bankruptcy Act and particularly in view of the fact that both The Bank of Nova Scotia, complainant in said Equity case No. 2151 and the Special Master appointed to effect said sale had due notice of such filing prior to the time when said sale was effected.

Sixteenth. The Court erred in failing to find that the sale, the order of confirmation and the deed referred to in detail in assignment Fifteenth hereinabove were and are nugatory and of no legal consequence, in view of the fact [fol. 280] that Debtor herein having seasonably and properly raised that issue in paragraph III of her answer and opposition filed to the pleading entitled "Petition of the Bank of Nova Scotia", in the form of a cross-bill or counter-claim and prayed for relief towards that end and said The Bank of Nova Scotia having failed to file a replication or reply to said cross-bill or counter-claim, said allegations were admitted, entitling Debtor herein to the relief prayed for in that respect.

Seventeenth. The Court erred in finding that The Bank of Nova Scotia was a party to these proceedings because of the stay provided by Section 75 (o) authorized it to file its petition entitled "Petition of the Bank of Nova Scotia" praying for the relief provided by said Section 75 (o), when Debtor herein was already proceeding under 75 (s) and

then eliminating said petition and limiting the hearing to the jurisdictional issue as to whether Debtor was or is a farmer raised in the other pleading filed and entitled "Motion for Dismissal", in which latter pleading no issue whatsoever was raised as to the vacation of the stay, because through the elimination of said "Petition of the Bank of Nova Scotia" praying for vacation of the stay, the Court eliminated the only ground on which said Bank might have qualified as a party in interest to these proceedings.

Eighteenth. The Court erred in failing to find that said The Bank of Nova Scotia having made no defenses to Debtor's petition under Section 75 of the merits, while Debtor was proceeding under subdivisions (a) to (r) of [fol. 281] said Section and said Bank having failed to furnish any excusable explanations for failure to interpose said defenses in the regular course and within the time fixed by the Bankruptcy Act, said Bank, even though it were a party in interest to these proceedings, would be guilty of the relief prayed for and which resulted in the order or decree complained of.

Nineteenth. The Court erred in failing to find that there having been a general reference of Debtor's petition to the Conciliation Commissioner for the District since October 13, 1938, the issue of lack of good faith, if at all, should have been seasonably raised before the Conciliation Commissioner within the time fixed by the Bankruptcy Act and not belatedly before the Court and after Debtor herein was proceeding under Section 75 (s).

Twentieth. The Court erred in failing to find that the issues raised by the petition and "Motion for Dismissal" filed by said The Bank of Nova Scotia and which resulted in the order or decree complained of, if at all, should have been raised by answer and opposition praying for vacation of the adjudication, once that event should have occurred and not extemporaneously by motion to dismiss since the latter pleading is treated as a demurrer under the old rules and may not be resorted to for the purpose of raising or trying questions of fact dehors the record.

[fol. 282] Twenty-first. The Court erred in failing to find that Debtor herein having already filed on November 3, 1938 her amended petition praying to be adjudged a bankrupt under Section 75 (s) of the Bankruptcy Act and also

her petition for appraisal as provided by said Section 75 (s) and the question of feasibility of the extension proposal of plan submitted by Debtor herein not having been seasonably raised before the Conciliation Commissioner to whom the proceedings herein had been referred, while Debtor herein was proceeding under sub-sections (a) to (r) of said Section, the issue being for the first time raised "In Bankruptcy", said issue, if at all, could only be raised and tried after said appraisal should have been completed and the Conciliation Commissioner should have rendered a report to the Hon. Judge of this Court based on said Appraisal, as to whether such three year rehabilitation was possible.

Twenty-second. The Court erred in failing to find that the record of this case as well as the record of Equity suit No. 2151 also before this Court, in which latter case said The Bank of Nova Scotia is plaintiff and Debtor herein one of the defendants, definitely and conclusively establishes the status of Debtor herein as a farmer as regards her interest in the agricultural enterprise in the island of Vieques, P. R.

Twenty-third. The Court erred in failing to find that a general reference of these proceedings having been made to [fol. 283] the Conciliation Commissioner, the proceedings as to the issues pertaining to feasibility and lack of good faith, if at all, should have been had before the Conciliation Commissioner or Referee, as required by General Order XII, it being that said proceedings are not included amongst those required by the Act to be had before the Judge.

Twenty-fourth. The Court erred in failing to find that Debtor herein is also a farmer because of the fact that her principal income is derived from one or more of the farming operations listed in Section 75 (r) of the Bankruptcy Act.

Twenty-fifth. The Court erred in failing to find that no evidence to the contrary having been submitted on the issue of good faith as to the initiation of the proceedings herein in the course of the hearing which resulted in the order or decree complained of, or at any other time, the allegations pertaining to said issue incorporated in Debtor's answers and oppositions to the petition and to the "Motion for Dismissal" filed herein by The Bank of Nova Scotia, coupled

with the nature of the offer made by Debtor to her creditors through her extension proposal or plan submitted herein constitute a definite proof of Debtor's good faith.

Twenty-sixth. The Court erred in failing to find that through the filing of the verified petition herein by Debtor alleging to be a farmer and manifesting a desire to effect [fol. 284] a composition or extension of time to pay her debts and the approval of her said petition by the Judge of this Court, a presumption of bona fides of the filing of the petition was raised which was not overcome by the evidence submitted in the course of the hearing which resulted in the order or decree complained of.

Twenty-seventh. The Court erred in rejecting affidavit No. 6086 subscribed and sworn to by Erasto Arjona Siaca, Esq. in this city of Ponce, P. R. on December 24, 1938 before Notary Public Carlos J. Teissonniere, offered in evidence and marked "rejected evidence", which affidavit establishes that Debtor herein is a farmer; that Debtor's principal income is derived from one or more of the farming operations listed in Section 75 (r) of the Bankruptcy Act; that Debtor herein proceeded in absolute good faith in filing her petition herein; that Debtor herein initiated partition proceedings as to her interest in the agricultural properties and enterprise in the island of Vieques, P. R. since the year 1936, which proceedings could not be continued because of the filing of Equity suit No. 2151 by The Bank of Nova Scotia and the prohibitions included in the order appointing the receiver made and entered in said suit and that due to the difficulties and complications which have been created to Debtor herein, the filing of her petition under Section 75 of the Bankruptcy Act was the only means [fol. 285] left at Debtor's disposal to pay all her creditors in full and at the same time promote her financial rehabilitation, because the petition and motion filed herein by said The Bank of Nova Scotia - *du which* resulted in the order or decree complained of having been originally set for hearing on motion day of this Court and said hearing continued at the request of counsel for said Bank and both pleading-being of such nature as are disposed of in summary hearing, Debtor herein was entitled to present her evidence through affidavits, particularly so in view of the fact that Debtor's attorneys were not informed that the summary proceedings would be converted into a plenary hearing in

time for them to prepare the evidence to be submitted in the form and manner provided for the submission of evidence in a plenary hearing or to bring the witnesses residing at distant places to testify in open Court.

Twenty-eighth. The Court erred in rejecting affidavit No. 1548 subscribed and sworn to by Julio Usera in the city of Ponce, P. R. on December 24th, 1938 before Notary Public, Arjona Siaca, which affidavit was offered in evidence and marked "rejected evidence" and established that Debtor herein is a farmer as defined in Section 75 (r) of The Bankruptcy Act, because the petition and motion filed herein by the Bank of Nova Scotia and which resulted in the order or decree complained of having been originally set for hearing on motion day of this Court and said hearing continued [fol. 286] at the request of counsel for said Bank and both pleadings being of such nature as are disposed of in summary hearings, Debtor herein was entitled to present her evidence through affidavits, particularly, so in view of the fact that Debtor's attorneys were not informed that the summary proceedings would be converted into a plenary hearing in time for them to prepare the evidence to be submitted in the form and manner provided for a plenary hearing nor to bring the witnesses residing at distant places to testify in open Court.

Twenty-ninth. The Court erred in rejecting affidavit No. 1545 subscribed and sworn to by Reinaldo Rivera in the city of Ponce, P. R. on December 24th, 1938 before Notary Public E. Arjona Siaca, which affidavit was offered in evidence and marked "rejected evidence" and establishes that Debtor herein is a farmer as defined in Section 75 (r) of the Bankruptcy Act, because the petition and motion filed herein by The Bank of Nova Scotia and which resulted in the order or decree complained of having been originally set for hearing on motion day of this Court and said hearing continued at the request of counsel for said Bank and both pleadings being of such nature as are disposed of in summary hearings, Debtor herein was entitled to present her evidence through affidavits, particularly so, in view of the fact that Debtor's attorneys were not informed that the summary proceedings would be converted into a plenary hearing in time for them to prepare the evidence to be submitted in the form and manner provided for a plenary

[fol. 287] hearing nor to bring the witnesses residing at distant places to testify in open Court.

Thirtieth. The Court erred in rejecting affidavit No. 1547 subscribed and sworn to by Antonio Farinacci in the city of Ponce, P. R. on December 24, 1938 before Notary Public E. Arjona Siaca which affidavit was offered in evidence and marked "rejected evidence" and establishes that Debtor herein is a farmer as defined in Section 75 (r) of the Bankruptcy Act, because the petition and motion filed herein by the Bank of Nova Scotia and which resulted in the order or decree complained of having been originally set for hearing on motion day of this Court and said hearing continued at the request of counsel for said Bank and both pleadings being of such nature as are disposed of in summary hearings, Debtor herein was entitled to present her evidence through affidavits, particularly so, in view of the fact that Debtor's attorneys were not informed that the summary proceedings would be converted into a plenary hearing in time for them to prepare the evidence to be submitted in the form and manner provided for a plenary hearing nor to bring the witnesses residing at distant places to testify in open Court.

Thirty-first. The Court erred in rejecting affidavit No. 1549 subscribed and sworn to by Jose T. Diaz in the city of Ponce, P. R. on December 24th, 1938 before Notary Public E. Arjona Siaca, which affidavit was offered in evidence and marked "rejected evidence" and establishes that Debtor herein is a farmer pursuant to the provisions of Section 75 (r) of the Bankruptcy Act, because the petition [fol. 288] and motion filed herein by The Bank of Nova Scotia and which resulted in the order or decree complained of having been originally set for hearing on motion day of this Court and said hearing continued at the request of counsel for said Bank and both pleadings being of such nature as are disposed of in summary hearings, Debtor herein was entitled to present her evidence through affidavits, particularly so, in view of the fact that Debtor's attorneys were not informed that the summary proceedings would be converted into a plenary hearing in time for them to prepare the evidence to be submitted in the form and manner provided for a plenary hearing nor to bring the witnesses residing at distant places to testify in open Court.

Thirty-second. The Court erred in rejecting the affidavit subscribed and sworn to by Francisco G. Subirá and which was offered in evidence and marked "rejected evidence" and establishes that Debtor herein is a farmer pursuant to the provisions of Section 75 of the Bankruptcy Act and that the petition filed in the above entitled proceedings by Debtor herein prior to the time set for the sale of certain securities in which Debtor herein has a substantial interest pursuant to the decree made and entered in said Equity Suit No. 2151 and that both the attorney for The Bank of Nova Scotia and the Special Master had actual notice of such filing prior to the consummation of said sale, as [fol. 289] alleged by Debtor herein in the cross-bill or counter-claim incorporated in paragraph III of her answer to the "Petition of The Bank of Nova Scotia" filed herein because the petition and motion filed herein by The Bank of Nova Scotia and which resulted in the order or decree complained of having been originally set for hearing on motion day of this Court and said hearing continued at the request of counsel for said Bank and both pleadings being of such nature as are disposed of in summary hearings, Debtor herein was entitled to present her evidence through affidavits, particularly so, in view of the fact that Debtor's attorneys were not informed that the summary proceedings would be converted into a plenary hearing in time for them to prepare the evidence to be submitted in the form and manner provided for a plenary hearing nor to bring the witnesses residing at distant places to testify in open Court.

Thirty-third. The Court erred in failing to find that Debtor herein is a farmer pursuant to the provisions of Section 78 (r) of the Bankruptcy Act because her two answers and oppositions filed herein were verified under oath and on personal knowledge as regards said issue and The Bank of Nova Scotia did not overcome their probative force by witnesses or by one witness with corroborating circumstances as required by law.

Thirty-fourth. The Court erred in failing to find that Debtor herein filed her petition under Section 75 of the Bankruptcy Act in good faith because her two answers and oppositions filed herein were verified under oath and on [fol. 290] personal knowledge as regards said issue and The Bank of Nova Scotia did not overcome their probative

force by witnesses or by one witness with corroborating circumstances as required by law.

Thirty-fifth. The Court erred in failing to find that the extension proposal or plan submitted by Debtor herein in these proceedings was feasible because her two answers and oppositions filed herein were verified under oath and on personal knowledge as regards said issue and the Bank of Nova Scotia did not overcome their probative force by witnesses or by one witness with corroborating circumstances, as required by law.

Thirty-sixth. The Court erred in failing to find that in praying for the vacation of the automatic and self-executing stay provided by subsections (o) and (p) of Section 75 through it pleading entitled "Petition of The Bank of Nova Scotia" which was previously filed and set for hearing by this Court jointly with the pleading filed subsequently by said Bank, entitled "Motion for Dismissal", said Bank waived the issue as to jurisdiction, feasibility and good faith in the filing of the petition herein, because said elements of jurisdiction, feasibility and good faith are necessary and indispensable in order to create such automatic and self-executing stay.

Thirty-seventh. The Court erred in entering an order in open Court at the time of the hearing which resulted in the order or decree complained of to the effect that the Clerk would enter an order dismissing the petition for lack of [fol. 291] jurisdiction and then permitting the attorneys for said The Bank of Nova Scotia to draw a "Decree of Dismissal" including other grounds eliminated in the course of said hearing which was limited exclusively to the jurisdictional question as to whether Debtor herein was or was not a farmer by order of this Court, thereby preventing Debtor herein from offering evidence as to the other issues not tried and incorporated in said decree.

Thirty-eighth. The Court erred in permitting counsel for the Bank of Nova Scotia to draw the Decree of Dismissal and the Opinion and Findings of Fact and Conclusions of Law made pursuant thereto and not having copy of the draft of said Decree of Dismissal thus prepared served upon the undersigned attorneys, giving them reasonable time to file such objections as to them might have seemed pertinent and proper before same was signed and entered

as of record, as required by law and the rules for the case made and provided, and in particular, by Rule 38 of this Court, then and now in full force and effect.

Thirty-ninth. The Court erred in entering an Opinion with questions of law and fact intermingled pursuant to the Decree of Dismissal made and entered herein, because such Opinion is not contemplated or permitted by the law and the rules for the case made and provided and, in particular, by Supreme Court Equity Rule 70½ adopted by this Court quite some time ago and now and then in full force and effect.

[fol. 292] Fortieth. The Court erred in finding in its said "Opinion that the Supreme Court of Puerto Rico in a recent case pertaining to this very community or "comunidad" has clearly explained the nature of the interest of a member thereof, without citing the case referred to (which is the case of Carle Dubois vs. Jose J. Benitez Diaz) and in applying the principles of said case to the present one, it being that the particular case referred to was initiated several years ago when the contractual "comunidad" was still in force and has no bearing on the present situation when such contractual "Comunidad" no longer exists.

Forty-first. The Court erred in finding in its said "Opinion" that Debtor herein in her proposal for composition and her request for adjudication under subsection (s) in effect asks the Bankruptcy Court to entertain partition proceedings because Debtor herein has filed no proposal for composition in these proceedings and no such request was incorporated in Debtor's amended petition under said sub-section (s) which amended petition simply prayed for adjudication pursuant to the provisions of Section 75 (s) and for such other and further relief to which Debtor herein might be entitled.

Forty-second. The Court erred in finding in its said "Opinion that the properties of the said Community or "Comunidad" are not susceptible of physical partition because such finding besides being immaterial, irrelevant [fol. 293] and not pertinent to the issue as to whether Debtor herein is or is not a farmer to which the hearing which resulted in the order or decree of dismissal complained of was limited, is contrary to law, and in particular,

to the provisions of the Civil Code of Puerto Rico pertaining to the subject of "Comunidades".

Forty-third. The Court erred in finding in its "Opinion" that a hearing on the plan of reorganization submitted in Equity suit No. 2151, has been set for January 9, 1939 because such finding, besides being immaterial, irrelevant and not pertinent to the issue as to whether Debtor herein is or is not a farmer, to which issue this Court limited the hearing which resulted in the order or Decree of Dismissal complained of, gives the impression that such hearing may be legally held and said plan approved when such is not the case, amongst others, for the following reasons:

(a) Because Debtor herein having filed her petition under Section 75 of the Bankruptcy Act and said petition having been approved by the Hon. Judge of this Court and Debtor having served notice in open court at the termination of the hearing which resulted in the order or Decree of Dismissal complained of to the effect that she intended to appeal from the order which this Hon. Court stated would be entered by the Clerk, dismissing the petition herein, praying at the same time that an order be made touching the security to be furnished by her, no action as regards the share of the properties belong to Debtor herein in the [fol. 294] agricultural enterprise in Vieques may be taken until a final decision shall have been rendered in connection with her appeal.

(b) Because J. Octavio Seix, one of the defendants in said Equity suit No. 2151, Consolidated Cause, has filed and answer and opposition and continues to oppose said plan of reorganization alleging that it is, unequitable and unfair and not feasible and said plan being predicated upon a decree of foreclosure being entered by consent of all the parties to said Equity suit, it is absolutely impossible to carry said plan into execution as long as one of the defendants in said Equity suit No. 2151, Consolidated Cause, shall refuse to accept same.

(c) Because the jurisdiction of this Court to pass upon and consider said plan of reorganization originating from an order entered by this Court in said Equity suit No. 2151 on January 14, 1938, as alleged and Debtor herein having in the meantime appealed from said particular order in

conjunction with the appeal filed and allowed to her from the final decree made and entered in said Equity suit No. 2151, the power of this Court to proceed further with the case has been suspended, so that this Court is without jurisdiction to consider and enter a decision pursuant to said plan of reorganization.

(d) Because Debtor herein having given notice in open Court of her intention to appeal from the order made and entered in the above entitled proceedings dismissing her [fol. 295] petition under Section 75 of the Bankruptcy Act, as soon as said order should be filed at the office of the Clerk of this Court and Debtor herein being entitled to a supersedeas as of course for a period of ten days following the date on which the decree was made and entered at the office of the Clerk, that is, up to January 13, 1939, no order approving said plan of reorganization may be entered before that time and, in the meantime, Debtor herein will have perfected her appeal herein, pursuant to the provisions of Section 24 of the Bankruptcy Act and then no further proceedings may be entertained as regards her share in the properties and assets covered by said plan of reorganization until a final decision shall have been rendered pursuant to her said appeal.

(e) Because said plan is based upon Complainant in said Equity suit No. 2151, Consolidated Cause, proceeding to foreclose the mortgages to which ancillary suits No. 2349 and 2350 refer and service on defendant co-proprietor Gabriel Ferrer Otero in said Consolidated Suit having been obtained by publication and said Gabriel Ferrer Otero having never appeared in said suit or subjected himself to the jurisdiction of this Hon. Court, the decree against him made and entered on August 22, 1938 and any other decree which may be entered against him in purely conditional for for one year from entry, preventing any disposition of the properties and assets belonging to said defendant and involved in said suit, within that time.

[fol. 296] Forty-fourth. The Court erred in finding in its said "Opinion" that the only method of equitable division of the properties of the agricultural enterprise in Vieques in which Debtor herein has an interest would be by sale and liquidation and division of the net proceeds because such findings besides being irrelevant, immaterial and not per-

inent to the issue as to whether Debtor herein is or is not a farmer (to which issue the hearing which resulted in the order or decree complained of was limited) and also immaterial as regards the provisions of Section 75 of the Bankruptcy Act, is besides contrary to law and, in particular, to the provisions of the Civil Code of Puerto Rico pertaining to the subject of "Comunidades".

Forty-fifth. The Court erred in finding in its "Opinion" that in the extension proposal submitted by Debtor herein no plan or method appears whereby Debtor herein is to finance the operation of the properties which she claims because said finding, besides being immaterial, irrelevant and not pertinent to the issue as to whether Debtor herein is or is not a farmer (to which single issue the hearing which resulted in the order or decree of dismissal complained of was limited by the Court) is contrary to the facts appearing from the record of this case and the evidence submitted in the course of said hearing.

Forty-sixth. The Court erred in finding in its "Opinion" that the proceedings here were initiated for the sole purpose of causing further undue delay in the said equity proceedings and in order to harass the creditors and other members of the Community or "Comunidad" and that Debtor herein has not proceeded herein with the good faith required by the Act because said finding, besides being immaterial, irrelevant and not pertinent to the issue as to whether Debtor herein is or is not a farmer, (to which single issue the hearing which resulted in the order or decree complained of was limited by the Court) is not supported by any of the records submitted in evidence through the stipulations of counsel hereinbefore referred to or by any other evidence submitted in the course of said hearing.

Forty-seventh. The Court erred in referring in paragraph two on page one of the Findings of Fact and Conclusions of Law to Debtor's "alleged" creditors, since the record of the proceedings herein and the record of said Equity suit No. 2151 definitely show that Debtor herein does have certain creditors, including judgment creditors having judgment liens on Debtor's properties and assets.

Forty-eighth. The Court erred in stating on pages one and two of the Findings of Fact and Conclusions of Law

that Debtor herein filed a petition for adjudication as a bankrupt under subject (5) of said Section 75 and another such petition on December 1st, 1938, because Debtor herein filed only two petitions around that time, both of which two [fol.298] petitions were simultaneously filed on November 30th, 1938, one of said petitions being an amended petition praying that Debtor herein be adjudged a bankrupt pursuant to the provisions of Section 75 (s) of the Bankruptcy Act and the other a petition praying that all her property be appraised; that her unencumbered exemptions or unencumbered interest or equity in her exemptions be set aside to her and that she be allowed to retain possession or be placed in possession of all the remainder of her property, wherever located.

Forty-ninth. The Court erred in failing to find that prior to December 1st, 1938 said The Bank of Nova Scotia had filed another petition herein entitled "Petition of The Bank of Nova Scotia" praying for the vacation of the stay of proceedings and that said petition together with the pleading filed by said Bank and designated "Motion for Dismissal" were set for hearing simultaneously on motion day of this Court and the hearing continued at the request of said The Bank of Nova Scotia for a later date.

Fiftieth. The Court erred in failing to find that although the pleading filed by said The Bank of Nova Scotia entitled "Motion for Dismissal" raised various issues, at the time of the hearing which resulted in the order or decree complained of, the Court limited the issue exclusively to the jurisdictional question as to whether Debtor herein was or was not a farmer, pursuant to the provisions of Section 75 (r) of the Bankruptcy Act.

[fol.299] Fifty-first. The Court erred in finding that Debtor herein filed her answer and opposition to said "Motion for Dismissal" on December 12th, 1938 because such answer and opposition was filed on December 9th, 1938 in the course of the hearing had on motion day of this Court on that date.

Fifty-second. The Court erred in finding that all the records of Equity Cases Nos, 2151, 2349, 2350 and 2322 now pending before this Court and of Bankruptcy Case No. 1258, as well as the record in the present case would be considered as evidence in this matter pursuant to stipulation

of counsel because said stipulation was limited exclusively to such portions of said records as would be pertinent to the issue of issues to be passed upon by the Court.

Fifty-third. The Court erred in finding that Debtor's husband J. Octavio Seix is President of Pan-American Trading Company because no evidence was offered in that respect in the course of the hearing which resulted in the order or decree of dismissal complained of.

Fifty-fourth. The Court erred in finding that Debtor herein received from her husband not less than \$200.00 per month because the testimony of Debtor in that respect was that her husband delivered to her the approximate sum of \$200.00 per month with which to pay servants, etc. meaning moneys given to her for the expenses of the home, there having been no other evidence offered in that respect.

[fol. 300] Fifty-fifth. The Court erred in finding that a contractual community exists since the evidence offered in the course of the hearing which resulted in the Decree of Dismissal complained of does not justify such finding but, on the contrary, is uniform in establishing that no such contractual "comunidad" has existed since prior to the time of the appointment of the Receiver in said Equity suit No. 2151 on October 20th, 1936.

Fifty-sixth. The Court erred in failing to find that in addition to Debtor's original interest of one-twelfth in fee and one sixtieth in remainder in the agricultural enterprise in Vieques, Debtor herein is also entitled to a liquidation and adjudication for profits and other emoluments accruing to her since the year 1917, which allegation was incorporated in her verified answer and opposition to the petition and the "Motion for Dismissal" hereinbefore referred to, the probative force of said allegation made in an answer under oath and verified on personal knowledge not having been overcome by witnesses or by one witness with corroborating circumstances, as required by law.

Fifty-seventh. The Court erred in finding that the community contract (which in fact does not exist) is essentially a partnership agreement because of the Court having previously decided in the decree made and entered in said Equity suit No. 2151 that the form of organization that existed while such contract was in force prior to August

1st, 1935 was "comunidad" or joint proprietorship as [fol. 301] defined by the Civil Code of Puerto Rico.

Fifty-eighth. The Court erred in finding that Debtor herein never intervened in the operation of the properties or sugar enterprise in Vieques and that Debtor herein has never participated in the management thereof, since the evidence submitted at the time of the hearing which resulted in the order or decree of dismissal complained of definitely establishes that Debtor herein has operated her share in said properties and sugar enterprise since the year 1917 through an agent or manager in a manner which did not cause the operation and management to cease to be her own.

Fifty-ninth. The Court erred in finding that Debtor herein has never been in actual possession of her share in said properties and in said sugar enterprise because such finding, besides being immaterial, irrelevant and not pertinent to these proceedings, is contrary to the evidence submitted at the time of the hearing which resulted in the order or decree of dismissal complained of.

Sixtieth. The Court erred in finding that since the year 1933 Debtor herein has received no income from her share in said properties or sugar enterprise excepting the \$3000.00 received by Debtor in the year 1933 or 1934 and the \$20,000.00 which she received in the year 1937 from benefit payments paid by the Agricultural Adjustment Administration because it is not the question of receipts but the questions of earned income that must be taken into consideration in determining the total income received by Debtor herein [fol. 302] from her agricultural operations.

Sixty-first. The Court erred in finding that Debtor herein received said sum of \$20,000.00 pursuant to an agreement of division of said benefit payments entered into between Debtor herein and the other members or co-proprietors of the community or "comunidad", Benitez Sugar Company and The Bank of Nova Scotia because no evidence whatsoever was offered in that respect at the time of the hearing which resulted in the order or decree complained of, but on the contrary, when said alleged agreement was offered in evidence, same was rejected by the Court, to which ruling no exception whatsoever was taken.

Sixty-second. The Court erred in finding that Debtor herein has never furnished any money for the properties

and sugar enterprise hereinbefore referred to and that Debtor has never paid any taxes on said properties because said finding is contrary to the evidence submitted in the course of the hearing which resulted in the order or decree of dismissal complained of.

Sixty-third. The Court erred in finding that said The Bank of Nova Scotia has financed said properties and sugar enterprise since prior to the year 1927 by annual crop loans and other loans and not the individual co-proprietors because said finding is contrary to the evidence submitted at the time of the hearing which resulted in the order or decree of dismissal-complained of.

[fol. 303] Sixty-fourth. The Court erred in finding that in July 1933 said The Bank of Nova Scotia entered into possession of the properties in which Debtor herein has an interest and operated them until they were taken over by the Receiver appointed by this Court in Equity Case No. 2151, without finding further that such possession was entered into under an agreement with Debtor herein and the other co-proprietors in what is tantamount to a contract of antichresis and not by way of ownership or in any other respect.

Sixty-fifth. The Court erred in finding that Jose de Jesus Benitez Sampayo, one of the members or co-proprietors of said community or "Comunidad" filed a petition for composition or extension under Section 74 of the Bankruptcy Act and that the Court on several occasions has refused to stay proceedings in Equity Case No. 2151 upon petition of said Debtor or his Custodian, because said finding besides being immaterial, irrelevant and not pertinent to the issue of this case, fails to take into consideration that said Section 74 does not provide the automatic and self-executing stay provided by subsection (n) of Section 75.

Sixty-sixth. The Court erred in finding that upon motion of Debtor herein, the suit for partition filed by Jose de Jesus Benitez Sampayo was held in abeyance because such finding is contrary to the evidence submitted at the time of the hearing which resulted in the order or decree of dismissal complained of.

[fol. 304] Sixty-seventh. The Court erred in finding that Debtor herein has no debts other than those which may

possibly arise by virtue of her secondary liability as a member of said contractual community or "comunidad" because the evidence offered in the course of the hearing which resulted in the order or decree complained of is contrary to such finding.

Sixty-eighth. The Court erred in holding that Debtor herein is not a farmer as defined in Section 75 of the Bankruptcy Act, with respect to her share in the properties and sugar enterprise hereinbefore referred to because such conclusion of law besides being immaterial, irrelevant and impertinent to the issues of this case is contrary to the evidence produced at the time of the hearing which resulted in the order or decree of dismissal complained of.

Sixty-ninth. The Court erred in holding that if Debtor herein be a farmer as defined in said Act with respect to her poultry business, she is not insolvent or unable to pay her debts with respect thereto, as they mature, because said conclusion of law besides being immaterial, irrelevant and impertinent to the issues of this case is contrary to the evidence produced at the time of the hearing which resulted in the order or decree of dismissal complained of.

Seventieth. The Court erred in holding that Debtor herein by her individual petition cannot bring the properties [fol. 305] of said community or "comunidad" nor of the Benitez Sugar Company under the administration of the Bankruptcy Court because said conclusion of law is irrelevant, immaterial and not pertinent to the issue presented by this case which refers exclusively to Debtor's interest in the properties and business of the agricultural enterprise in Vieques in addition to her other properties and assets and liabilities and her poultry business which have no connection whatsoever with said agricultural enterprise in Vieques.

Seventy-first. The Court erred in holding that as a Bankruptcy Court it is without jurisdiction to entertain Debtor's petition filed herein because such conclusion of law is contrary to law and to the evidence produced in the course of the hearing which resulted in the order or decree of dismissal complained of.

Seventy-second. The Court erred in holding that the petition of Debtor herein was not filed in good faith and that

Debtor herein has not proceeded in good faith because said conclusion of law besides being immaterial, irrelevant and not pertinent to the issue as to whether Debtor herein is a farmer or not, to which issue the hearing which resulted in the decree of dismissal complained of was limited by order of this Court, is contrary to law and not supported by the records of the various cases offered in evidence at the time of the hearing herein and hereinbefore referred to.

Seventy-third. The Court erred in holding that Debtor herein must pay the costs of the proceedings herein, after [fol. 306] having entered an order in the course of the hearing which resulted in the order or decree complained of to the effect that said hearing would be limited exclusively to the decision of the jurisdictional question as to whether Debtor herein was or was not a farmer pursuant to the provisions of the Bankruptcy Act because said conclusion of law is contrary to law in that when a petition is dismissed exclusively on jurisdictional grounds, the court may not decree Costs.

Seventy-fourth. The Court erred in entering its decree of dismissal dismissing the petition filed herein by Debtor and all the proceedings had thereunder with costs to Debtor herein, because said decree is contrary to law and to the evidence produced in the course of the hearing which resulted in the said decree of dismissal.

Seventy-fifth. The Court erred in overruling objections by Debtor's counsel to questions propounded by the counsel for The Bank of Nova Scotia thereby admitting improper and prejudicial testimony:

"Q. What is your husband's occupation, Mrs. Seix?"

"Mr. Silva: I object to that, your Honor.

"The Court: I think it might be relevant. Proceed.

"A. Well, he is a business man. I don't know.

[fol. 307] Q. I mean what particular business has he been engaged in the past year?

A. I know nothing of his business.

Q. Do you know how much his annual income is?

A. I don't know. I get what I want. That's all.

Q. And how much do you receive from him a year?

Mr. Silva: May I object again, your Honor. I don't see the relevancy of that question.

The Court: I think that is relevant.

Mr. Silva: I take an exception, your Honor.

A. Well, I couldn't exactly tell you. I know that whenever I need money, I get it.

Q. Could you tell us approximately how much?

The Court: One hundred dollars a month, two hundred dollars a month?

A. When he has money I spend whatever I want, and when he hasn't I spend as little as possible. I couldn't tell you.

Q. You must be able to give some idea. Think, Mrs. Seix.

The Court: Do you get a substantial amount of money?
[fols. 308-454] A. Do you include everything, house, service, everything?

The Court: Everything.

A. It is over \$200.00 a month, or more, maybe.

Wherefore, Debtor in the above entitled proceedings prays that for the errors aforesaid, the order or decree of dismissal entered by the District Court of the United States for the District of Puerto Rico be reversed with costs.

San Juan, P. R. January 7th, 1938.

Geigel & Silva, by Guillermo Silva, Attorneys for
Carlota Benitez Sampayo. Office & P. O. Address:
The Chase National Bank Building and P. O. Box
1359, San Juan, P. R.

[fol. 455] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS

On June 16, 1939, upon petition, leave was granted appellant to proceed in forma pauperis.

Thereafter, to wit, on August 2, 1939, upon motion of appellant, leave was granted to file typewritten copies of transcript of record.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF HEARING

On October 18, 1939, this cause came on to be heard by the court, the Honorable Scott Wilson and Honorable Calvert

Magruder, Circuit Judges, and Honorable Hugh D. McLellan, District Judge, sitting; appellant submitting on brief by leave of court.

[fol. 456] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIRST CIRCUIT, OCTOBER TERM, 1939

No. 3488

CARLOTA BENITEZ SAMPAYO, Defendant, Appellant,

v.

THE BANK OF NOVA SCOTIA, Complainant, Appellee

No. 3486

SAME v. SAME

No. 3487

SAME v. SAME

Appeals from the District Court of the United States for
Puerto Rico

Before Wilson, Magruder and McLellan, JJ.

OPINION OF THE COURT—Filed January 10, 1940

MAGRUDER, J.:

These cases are related and will be dealt with in a single opinion.

No. 3488

Complainant, appellee, on October 20, 1936, filed in the District Court of the United States for Puerto Rico a bill in equity against Benitez Sugar Company, a corporation, and various persons, including the present appellant, individually and as members of the "Comunidad" Jose J. Benitez e Hijos, seeking foreclosure of certain securities [fol. 457] and of a crop lien in satisfaction of various joint and several obligations of the corporation and the Comunidad.

This Comunidad had large holdings of land on the Island of Vieques, Puerto Rico, used for growing sugar cane and

for pasturage. It also owned cattle, buidings, agricultural equipment, and held the capital stock of the Benitez Sugar Company, one of the defendants. The latter corporation owned a sugar factory, agricultural land, a large number of live stock, equipment, buildings, etc., all on the Island of Vieques, and devoted to the growing of sugar cane and the manufacture of raw sugar and molasses. The operations of the Comunidad and the Benitez Sugar Company had for many years been conducted "as a single and integrated enterprise". The Comunidad had been constituted by contract between the widower and the heirs of Carlota Sampayo Guzman in 1917, and by successive renewals extended to July 30, 1935. On July 1, 1933, the Bank of Nova Scotia, under the terms of a crop loan agreement with the Comunidad, took possession of the properties and operated them for the account of the Comunidad and the Sugar Company, applying the net proceeds to the repayment of the crop loans. When the contract regulating the Comunidad expired on July 30, 1935, no partition or liquidation of the business was had, but the Bank continued the operation of the business as theretofore, until a receiver took over.

Upon the filing of the bill for foreclosure a receiver was appointed ex parte, and his appointment was subsequently confirmed after hearing. The receiver took possession of said properties and operated the enterprise under orders of the court. A final decree was rendered on August 22, 1938, in favor of complainant bank. The decree adjudged that the Comunidad and the Sugar Company were jointly and severally indebted to the bank in the principal sum of \$673,569.82 with interest; that the members of the Comunidad were individually liable in proportion to their respective participations therein, that of the present appellant being a one-twelfth interest; that defendant members of the Comunidad, in proportion to their respective liabilities, and the defendant Benitez Sugar Company, must on or before [fol. 458] September 1, 1938, pay to the bank the said sum with interest, in default of which a special master was directed to sell at public auction the yarious pledged and mortgaged properties. Provision was made for an eventual deficiency judgment.

On November 17, 1938, appellant, being intent upen appealing from the decree, filed in the office of the Clerk of the District Court a so-called "petition for severance" which

recited that a "notice of severance" dated October 7, 1938, had theretofore been served on the other parties, and which requested the court to enter an order providing as follows:

"(a) Setting a day certain (not later than November 22nd, 1938) on which she may present to the Hon. Robert A. Cooper, Judge of this Court, her amended Notice of hearing on her Petition for Severance in the above entitled cause, together with proof of service thereof, and her Petition for Leave to Appeal.

"(b) That upon presentation of said amended notice, with proof of service thereof to the Hon. Robert A. Cooper, Judge of this Court, together with the Petition for Leave to Appeal and the Assignment of Errors, this Hon. Court enter an order severing the record and permitting your petitioner to prosecute her appeal without joining her co-parties."

An "amended notice of hearing on petition for severance", dated November 17, 1938, which was served on the other parties, read in part as follows:

"Please take notice that on November 23rd; 1938 the petition of Carlota Benitez Sampayo for severance of the record of the above entitled cause, together with her petition for leave to appeal from each and every one of the orders or decrees made or entered in the course of these proceedings and up to this date and, in particular, from the final decree entered herein on August 22, 1938 and other acts done and orders entered pursuant to said final decree, will be presented to the Hon. Robert A. Cooper, Judge of the District Court of the United States for the District of Puerto Rico."

This "petition for severance" came on for hearing on November 23, 1938, and was denied. A formal order of severance was evidently considered by the District Court not to be necessary to the perfecting of the appeal (see *United States v. King and Howe, Inc.*, 78 F. (2d) 693, 695 [fol. 459] (C. C. A. 2d, 1935)), for on the same day the court issued an order granting appellant's petition for leave to appeal and citation was served on appellee. On February 24, 1939, this order was, upon the motion of the appellee, vacated by the District Court on the ground that it had been improvidently granted the statutory three-months' period for appeal having expired. 28 U. S. C. § 230.

Appellant now appeals from this order of February 24, 1939, vacating the earlier order allowing the appeal. We believe that this vacating order is a "final decision" within the meaning of 28 U. S. C. § 225, and hence appealable to this court. If allowed to stand, it would finally dispose of the controversy. It would leave the decree of August 22, 1938, in effect and immune from attack by appeal, because the lapse of the three-months' period would preclude a new application, either to the District Court or to a judge of this court, for leave to appeal. The situation is therefore distinguishable from cases where an order is entered vacating a decree pro confesso and permitting the defendant to file an answer. *O'Brien v. Lashar*, 266 Fed. 215 (C. C. A. 2d, 1920); *Board of Supervisors v. Knickerbocker Ice Co.*, 80 F. (2d) 248 (C. C. A. 2d, 1935); *Beighle v. LeRoy*, 94 F. (2d) 30 (C. C. A. 3d, 1938). It is also distinguishable from orders refusing in the first instance to allow an appeal. Such orders are not reviewable as "final decisions" because they do not put an end to the controversy; the denial is not res adjudicata as to the right to appeal and an application can still be made to another judge. 28 U. S. C. § 228.

In her opposition to the motion to vacate, the order of November 23, 1938, allowing the appeal, appellant "admits that on November 23, 1938 she filed and presented to the Hon. Judge of this Court a Petition for Appeal from said final decree together with her assignment of errors and prayer for reversal and that on said date this Court entered the order allowing her appeal filed herein, as a matter of right, as provided by law." This application was made one day after the lapse of the statutory period. *Walters v. Baltimore & Ohio Railroad Co.*, 76 F. (2d) 599 (C. C. A. 3d, 1935); [fol. 460] *Northwestern Public Service Co. v. Pfeifer*, 36 F. (2d) 5, 7 (C. C. A. 8th, 1929). As was said in *Muckelroy v. Baldwin*, 70 F. (2d) 728, 729 (C. C. A. 8th 1934), "the three months' statutory period for appeal is mandatory and jurisdictional and, being such, it cannot be extended by waiver, consent, or even order of court." Accord, *Robie v. Hart, Schaffner & Marx*, 40 F. (2d) 871 (C. C. A. 8th, 1930); *Vaughan v. American Insurance Co.*, 15 F. (2d) 526, 527 (C. C. A. 5th, 1926); *Sprague v. Chicago B. & Q. Railroad*, 17 F. (2d) 768 (C. C. A. 8th, 1927). See *Alaska Packers Ass'n v. Pillsbury*, 301 U. S. 174 (1937).

Appellant refers to what we said in *Baez v. People of Puerto Rico*, 82 F. (2d) 317, 321 (1936): "An appeal is a

matter of right. It is the date of presentation of the application to the court or judge that fixes the right of the applicant to his appeal, not the date of its allowance." This is true; if application is seasonably made to the judge, the appeal will not be defeated because the judge delayed in acting on it, a circumstance beyond the control of the party appealing. *Cardona v. Quinones*, 240 U. S. 83 (1916); *J. D. Randall Co. v. Fogelsong Mach. Co.*, 200 Fed. 741 (C. C. A. 6th, 1912). But, as noted above, in the present case the application was not made until after the expiration of the three-months' period.

It is contended that the so-called "petition for severance" may be considered an application for leave to appeal. But this petition was not so regarded by appellant, who on November 23, 1938, filed a separate application for leave to appeal. The "petition for severance" gave notice of an intention to apply for leave to appeal. This, however, is not equivalent to an application. *Osborn v. United States*, 59 F. (2d) 712, 714 (C. C. A. 4th, 1931). *Robie v. Hart, Schaffner & Marx*, supra, page 872; *Vaughan v. American Insurance Co.*, supra, page 527; *United States v. New National Coal Co.*, 72 F. (2d) 168 (C. C. A. 7th, 1934), where the court said: "Merely declaring that he will appeal does not of itself amount to taking an appeal."

Furthermore, the "petition for severance" itself was not presented to the court until November 23, 1938. Even if we considered this petition as in effect an application for appeal, the filing of it with the clerk of the court on November 17 did not fulfill the statutory requirement. As this court said in *Baez v. People of Puerto Rico*, 82 F. (2d) 317 (1936) at 321:

"The filing of an application for appeal in the office of the clerk of the court where the judgment or decree is entered will not be regarded as an application 'duly made' under section 230, so as to stop the running of the statute, unless it be where the sole judge of that court or all of its judges are out of the jurisdiction, or incapacitated, so that an application cannot be made to a judge of that court within the three months period. Where the sole judge or all the judges of the court in which the judgment or decree is entered are out of the jurisdiction, or incapacitated, the filing of the application for appeal in the office of the clerk within three months from the entry of judgment or decree will not be permitted to defeat the right of the appellant."

To the same effect, see *United States v. New National Coal Co.*, supra, at page 168, where the court said, "The filing of the petition for appeal avails nothing unless within the statutory time allowed for taking the appeal it is brought to the attention of the judge for action thereon." See also *Green v. City of Lynn*, 87 Fed. 839 (C. C. A. 1st, 1898); *Camden Iron Works v. City of Cincinnati*, 241 Fed. 846 (C. C. A. 6th, 1917); *Ross v. White*, 32 F. (2d) 750, 752 (C. C. A. 6th, 1929).

A further point remains. On October 13, 1938, appellant filed in the District Court a farmer-debtor's petition for composition or extension under Section 75 of the National Bankruptcy Act, 11 U. S. C. § 203; on the same day the court approved the petition as properly filed under said Section and referred the same to a Conciliation Commissioner. Appellant contends that the pendency of this petition in the bankruptcy court operated to toll the three-months' period for appeal from the equity decree of August 22, 1938. We find no warrant in any provision of the Bankruptcy Act for this contention. Section 75 (o) (11 U. S. C. § 203 (o)) provides that certain enumerated proceedings "against the farmer or his property" shall not be maintained in any court while the petition under Section 75 (a) to (r) is pending. [fol. 462] *Kalb v. Feuerstein*, U. S. Supreme Court, Jan. 2, 1940. But this in no wise forbids an appeal by the farmer from an adverse equity decree entered prior to the filing of the petition in the bankruptcy court; and such appeal would have to be taken within the three-months' period provided in 28 U. S. C. § 230.

The order of November 23, 1938, allowing the appeal having been improvidently entered, the district court had power to vacate it. *United States v. Nordbye*, 75 F. (2d) 744 (C. C. A. 8th, 1935); *Farmers' Loan & Trust Co. v. McClure*, 78 Fed. 211 (C. C. A. 8th, 1897); *Mackenzie v. Pease*, 146 Fed. 743 (C. C. A. 7th, 1906). Even if the District Court had not vacated the order, we should still have been obliged to take note of our lack of jurisdiction and dismiss the appeal from the decree of August 22, 1938. *Walters v. Baltimore & Ohio Railroad Co.*, 76 F. (2d) 599 (C. C. A. 3d, 1935).

The order appealed from must be affirmed.

No. 3486

This is the original abortive appeal from the decree of August 22, 1938. Appellee moves to docket the case and

dismiss the appeal under Section 3 of our Rule 16 for failure of appellant to file the transcript of record. The appeal must be dismissed on the more fundamental ground just stated in No. 3488, namely that application for appeal was not made within the statutory period.

No. 3487

This is an appeal from an order of the District Court of the United States for Puerto Rico dismissing appellant's petition under Section 75 of the Bankruptcy Act.

After the entry of the equity decree mentioned in No. 3488, above, appellant on October 13, 1938, one hour before the foreclosure sale pursuant to said decree, filed in the District Court her petition as a farmer-debtor for composition or extension under Section 75 of the National Bankruptcy Act. 11 U. S. C. § 203. She did this in the belief that the pendency of this petition would operate under Section 75 (o) and (p) automatically to stay all further proceedings in the equity case and would, under Section 75(n), draw into the exclusive jurisdiction of the bankruptcy court all the real and personal property of the Comunidad, or at least her undivided fractional interest in this specific property. In addition to her interest in the farming operations of the Comunidad, appellant based her claim to be a "farmer" on the fact that at her home in the City of Ponce, P. R., where she lives with her husband, she has for several years engaged in a small way in raising and selling poultry and eggs, from which she derives a profit of about \$50 a month.

The debtor's schedule of debts, filed with her petition, listed her pro rata liability for all the debts of the "integrated enterprise"—the Comunidad and Beritez Sugar Company; also a debt of \$500 to her personal attorneys in this litigation, and a trivial debt on account of the poultry business. The schedule of the debtor's property listed all the specific real and personal property of the Comunidad and the Sugar Company, in which she claimed a one-twelfth interest. There was also listed an unspecified sum alleged to be owing the debtor by the "integrated enterprise", the amount of which could only be determined upon an accounting. In addition, petitioner listed certain personal property wholly owned by her—household effects, \$1,850, chickens and pigeons, together with lofts, poultry houses, supplies, etc., \$1,199.

The petition was presented *ex parte*, and on the same day the acting judge of the bankruptcy court issued an order approving it as properly filed under Section 75 (General Orders in Bankruptcy, L, par. 2), and referred the same to a Conciliation Commissioner. In due course, the debtor filed her inventory and proposal for extension.

Having failed to obtain from creditors the requisite assents to her proposal for extension, the debtor on November 30, 1938, amended her petition and asked to be adjudged a bankrupt under Section 75(s). The debtor further asked that her property be appraised, her exemptions set aside, and "that she be allowed to retain possession or be placed in possession of all of the remainder of her property" un-[fol. 464] der the conditions provided in said subsection (s).

On December 1, 1938, the Bank of Nova Scotia as a creditor filed a motion to dismiss the petition under Section 75 on the grounds that the petitioner was not a "farmer"; that the petition was not filed in good faith but for the purpose of interfering with the pending equity proceedings; and that the proposal for extension was impracticable and was not presented in good faith.

The debtor objects that Section 75 contains no provision for such a motion to dismiss. This is true but not important. The pro forma order of the court, on the day the petition was filed, approving the same as having been properly filed under Section 75, does not preclude the court at a later stage of the proceedings from taking note of a possible lack of jurisdiction, on its own motion, even without a motion by an interested party. See *Davis v. Shackleford*, 91 F. (2d) 148 (C. C. A. 8th, 1937). The District Court held a hearing on the jurisdictional issues, after due notice to the debtor. On January 3, 1939, the court rendered an opinion, filed findings of fact and conclusions of law, and decreed that the petition of the debtor be dismissed with costs. Appeal was duly taken from this decree.

The amended petition under Section 75(s) of the Bankruptcy Act could not properly be dismissed, upon the facts here appearing, on the ground of lack of good faith on the debtor's part. This is settled by the decision of the Supreme Court in *John Hancock Mutual Life Insurance Co. v. Bartels*, decided December 4, 1939. We must therefore consider whether the debtor is a "farmer" within the meaning of Section 75.

An initial difficulty is to determine the applicable defini-

tion of "farmer" for purposes of Section 75 of the Bankruptcy Act. Originally the term "farmer" was not defined or used in the Act, but Section 4(b) forbade the involuntary adjudication of "a wage earner or a person engaged chiefly in farming or the tillage of the soil". 30 Stat. 544; 47 Stat. 47. On March 3, 1933, the Act was amended by adding Sections 73-77. 47 Stat. 1467. Section 74 dealt with compositions or extensions in the case of "any person excepting a corporation". Section 74(l) did not use the term "farmer" but provided that "No order of liquidation or adjudication shall be entered in any proceeding under this section instituted by or against a wage earner or a person engaged chiefly in farming or the tillage of the soil unless the wage earner or a person engaged chiefly in farming or the tillage of the soil consents." 47 Stat. 1469. Section 75 dealt specially with agricultural compositions or extensions. Subsection (c) of that section provided for the filing of a petition by a "farmer". Subsection (r) provided (47 Stat. 1473):

"For the purpose of this section and section 74, the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur."

This definition was not made applicable to Section 4(b) above quoted. The first Frazier-Lemke Act, 48 Stat. 1289, added subsection (s), but made no change in the definition. The Act of May 15, 1935, 49 Stat. 246, took pains to establish a consistent definition of "farmer" throughout the Bankruptcy Act. Section 4(b) was amended to say "except a wage earner or a farmer". Section 74 (l) was amended to read "a wage earner or a farmer". Section 75(r) was amended to read:

"For the purposes of this section, section 4(b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured

state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

The second Frazier-Lemke Act enacted a new subsection (s) of Section 75 but made no change in the definition of [fol. 466] "farmer", which stood until the passage of the Chandler Act, 52 Stat. 840.

For the first time, by the Chandler Act, a definition of "farmer" was inserted in Chapter 1, Section 1 of the Bankruptcy Act, entitled "Definitions". Section 1(17) of the Bankruptcy Act, as thus amended, now reads as follows:

"Section 1. Meaning of Words and Phrases.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

"(17) 'Farmer' shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations;"

Section 75 is part of "this Act", that is, the Bankruptcy Act. Subsections (c) and (s) of Section 75 speak of the filing of a petition, and an amended petition, by a "farmer". There is nothing in the context of these subsections inconsistent with applying to the word "farmer" the new definition in Section 1(17). Section 75(r) contains the old definition of "farmer"; but this definition cannot be considered part of the "context" of the other subsections in which the word "farmer" is used. If it were so considered, it must equally be considered part of the "context" of Section 4(b) in which "farmer" appears, because by the express provision of Section 75(r) the definition of "farmer" there given was to apply to Sections 4(b) and 74 as well as to Section 75.

It is clear that the new definition of "farmer" in Section 1(17) was intended to apply to Section 4(b). The Report of the House Committee on the Judiciary¹ says:

¹ H. Rep. No. 1409, 75th Cong., 1st Sess. (Committee on Judiciary, July 29, 1937), p. 6.

"'Farmer'.—New clause (17): The amendment of May 5 [15], 1935 (11 U. S. C. Ann., sec. 203), extends the meaning of the term 'farmer' to include dairy farmers and persons engaged in the production of poultry or livestock or [fol. 467] its products in their unmanufactured state, whose principal income is derived from any one or more of these corporations. Correspondingly, section 4 of the act is amended by substituting the phrase 'a farmer' for the language 'a person engaged chiefly in farming or the tillage of the soil.' (See 11 U. S. C. Ann., sec. 22.) Pursuant to this purpose of Congress to expand the meaning of the term, it would seem advisable to formulate a new definition and to include it in section 1 as clause (17)."

We find no intimation in this language of an intention on the part of Congress to reintroduce the awkward situation of having "farmer" mean one thing in Section 4(b) and something else in Section 75, a situation which Congress had carefully eliminated by the Act of May 15, 1935, *supra*. The Chandler Act in applying the new definition of "farmer" to Section 4(b) necessarily amends Section 75(r) which reads, "For the purpose of this section, section 4(b) and section 74, the term 'farmer' includes" etc. Section 4(b) is now governed by the general definition in Section 1(17), and there is no longer any Section 74, which has been transposed to a later part of the Act, old Section 74 (l) referred to above now appearing as Section 379. 52 Stat. 913. The 1938 edition of the United States Code (11 U. S. C. § 203(r)) includes old Section 75(r) as though it had been unaffected by the Chandler Act. But the codification is only presumptive evidence of the laws (1 U. S. C. § 54(a)); and we are persuaded from a review of the legislative history that the Chandler Act amendment of Section 1(17) by implication repeals Section 75(r), so far as the old definition of "farmer" is inconsistent with the new. See Section 4 of the Chandler Act, 52 Stat. 940, containing the cautionary provisions that "• • • all Acts or parts of Acts inconsistent with any provisions of the amendatory Act are hereby repealed."²

² The Report of the House Committee on the Judiciary, referred to in footnote 1, *supra*, contains an addendum indicating the changes in existing law made by the Chandler bill as it then read. At p. 144 of this Report there is this statement: "Sec. 75. Agricultural Compositions and Exten-

[fol. 468] We take it, therefore, that the applicable definition is found in the new Section 1 (17): "'Farmer' shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations". Does the debtor in the case at bar fit within this definition? The phrase "an individual personally engaged in farming" is not a "term of art". "In every case the totality of the facts is to be considered and appraised." *First National Bank v. Beach*, 301 U. S. 435, 439 (1937). We think the District Court was right in concluding that the debtor was not "personally engaged" in the farming operations of the Comunidad on Vicques Island. She was a party to the community contract which designated her father as general manager, but she was a housewife living with her husband in the City of Ponce, P. R., and had no personal participation in the farming operations of the Comunidad. In fact the debtor testified that the limit of her intervention was to receive her share of the profits. She professed to know only from hearsay that the properties had been operated by the Bank of Nova Scotia from 1933 to the filing of the equity suit.

We think, also, that the debtor was not shown to be a "farmer" by virtue of her poultry business. Assuming that a housewife's raising of a few chickens in the back yard of a city home is the "production of poultry" within the meaning of the definition (cf. *In re McMurray*, 8 F. Supp. 449, 454), the debtor will not qualify under this category, unless the principal part of her income is derived from this poultry business. Whether the clause "if the prin-

sions. (No change.)" This can hardly be taken literally for, as has been pointed out, Section 75(r) has certainly been amended to the extent that the old definition of "farmer" therein contained is no longer to be applied to Section 4(b). "No change" seems to refer not to the definition, but to the substantive and procedural provisions dealing with relief to distressed farmers. It may be noted further that Section 2 of the Chandler Act, 52 Stat. 939, does specifically amend Section 75 in certain particulars not now relevant.

principal part of his income is derived from any one or more of such operations" modifies "an individual personally engaged [fol. 469] gaged in farming or tilling of the soil" need not now be decided; it certainly modifies the clause immediately preceding it, referring to "an individual personally engaged * * * in the production of poultry * * *" The debtor testified that she received \$50 a month from the poultry business. In 1937 she received \$20,000 as her share of benefit payments by the Department of Agriculture on account of the 1935 sugar crop of the Comunidad, and she claims that other substantial sums (amounts not indicated) are due her as profits from this "integrated enterprise", as would appear upon an accounting. As previously stated, the profits of the enterprise, since 1933, have been devoted to the payment of debts for which the Comunidad and its members, including appellant, were liable. On this record the debtor failed to establish, indeed made no effort to establish, that the principal part of her income was derived from the production of poultry; hence the District Court was not in error in its ultimate conclusion that "This Court as a bankruptcy court is without jurisdiction to entertain the debtor's petition filed herein."

A petition under Section 75 might have been filed by the Comunidad itself. Paragraph 4 of subsection (s) expressly extends the application of its provisions "to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition." 49 Stat. 945. But we are dealing here with an individual petition filed by one member of the Comunidad.

The District Court had power to award costs. 28 U. S. C. § 80; *Devost v. Twin State Gas & Electric Co.*, 252 Fed. 125 (C. C. A. 1st, 1918); *In re Snowden*, 36 F. (2d) 282 (D. C. Calif. 1929); *The Commercial Guide*, 23 F. (2d) 135 (D. C. Wash. 1927); *Phoenix-Buttes Gold Mining Co. v. Winstead*, 226 Fed. 863 (D. C. Calif. 1914).

The appellant filed petitions in Nos. 3487 and 3488 for correction of the records. These petitions have been considered by the court and are found to be without merit.

The decree of the District Court is affirmed.

[fol. 470] IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—January 10, 1940

This cause came on to be heard October 18, 1939, upon the transcript of record of the District Court of the United States for Puerto Rico, and was argued by counsel for appellee; appellant submitting on brief by leave of court.

Upon consideration whereof, It is now, to wit, January 10, 1940, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed.

By the Court,

Arthur I. Charron, Clerk

[fol. 471] IN UNITED STATES CIRCUIT COURT OF APPEALS

Order denying petition for rehearing

Thereafter, to wit, on February 7, 1940, a petition for rehearing was filed by appellant, which petition was denied on February 21, 1940.

[fol. 472] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIRST CIRCUIT, OCTOBER TERM, 1939

No. 3487.

CARLOTA BENITEZ SAMPAYO, Defendant, Appellant,

v.

THE BANK OF NOVA SCOTIA, Complainant, Appellee

Appeal from the District Court of the United States for
Puerto Rico

Before Wilson, Magruder and McLellan, JJ.

OPINION OF THE COURT—Filed February 21, 1940

Upon Petition for Rehearing

PER CURIAM:

Challenging our holding that the new definition of "farmer" in the Chandler Act applies to proceedings under Section 75 of the Bankruptcy Act, appellant cites a general

order in bankruptcy relating to petitions under Section 75 filed by personal representatives of deceased farmers. General Order No. 50 (9), effective February 13, 1939, reads in part as follows: "• • • The petition shall show to the satisfaction of the district court that the decedent at the time of his death was a farmer within the meaning of subdivision (r) of section 75. • • •" (305 U. S., App. p. 30). Form in Bankruptcy No. 63, accompanying the General Orders in Bankruptcy, provides that a petition under Section 75 shall recite that the petitioner "is primarily bona fide personally engaged in producing products of the soil [or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations]".

This provision of General Order No. 50 (9) was carried over without change from old General Order L (9) promulgated April 17, 1933 (288 U. S. 643). Form 63 was carried over without substantial change from the earlier Form No. 65 (288 U. S. 646).

The inference is that the Supreme Court in its latest revision of the General Orders in Bankruptcy, relating to proceedings under Section 75, has assumed that the old definition of "farmer" in Section 75 (r) was not affected by the Chandler Act. Had this matter been called to our attention before, we should have regarded even a tacit interpretation put upon the Chandler Act by the Supreme Court as of great importance, though not as compelling as would be a considered decision of the Supreme Court in a litigated case.

In determining whether we should draw the inference which appellant would have us draw from the general order in bankruptcy above referred to, it is noteworthy that the Supreme Court itself has had occasion to disregard a general order in bankruptcy inadvertently carried over and republished after a significant but unnoticed change of the law. *Meek v. Centre County Banking Co.*, 268 U. S. 426. In all candor we cannot now say that we believe our previously announced conclusion to be erroneous. That conclusion seemed to us plainly indicated on the face of the statute.

We are far from implying that appellant would qualify as a "farmer" even if the old definition in Section 75 (r) is still in effect. If *Shyvers v. The Security First National Bank*, decided by the Circuit Court of Appeals for the Ninth Circuit on December 21, 1939, is correct, appellant would seem not to be a "farmer" even under the definition [fol. 474] of Section 75 (r). We have not gone into this, because we believe that the applicable definition is the new one found in the Chandler Act.

The petition for rehearing is denied.

Thereafter, to wit, on March 13, 1940, mandate issued to the District Court.

[fol. 475] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 476] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis enter F. B. Fornaris. File No. 44,434, U. S. Circuit Court of Appeals, First Circuit, Term No. 90, Carlota Benitez Sampayo, Petitioner, vs. The Bank of Nova Scotia. Petition for a writ of certiorari and exhibit thereto. Filed May 21, 1940. Term No. 90 O. T. 1940.

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